1341.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 480. 148.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, AND THOMAS MORROW.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED SEPTEMBER 30, 1903.

(19,703.)

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a No. 708.

In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONnell, and Thomas Mosgrove, defendants in error.

TRANSCRIPT OF RECORD.

Upon writ of error to the circuit court of the United States for the district of Washington, southern division.

1 In the circuit court of the United States for the district of Washington, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, WILliam O'Donnell, and Thomas Mosgrove, defendants. } No. 137.

Amended complaint.

And now come the plaintiffs herein, and for their amended complaint, in accordance with the requirements of the order of court heretofore filed in this case, and permission having been granted by the court to amend said complaint generally, plaintiffs allege:

I.

That pursuant to an advertisement made by the Postmaster-General of the United States on the 16th day of September, 1899, inviting proposals for covered regulation wagon mail messenger, transfer, and mail station service at New Orleans, Louisiana, Omaha, Nebraska, and San Francisco, California, from July 1st, 1890, to June 30th, 1894, made and published by John Wanamaker, Postmaster-General of the United States, on
2 their behalf, Christopher C. McCoy, one of the defendants herein, made to the United States, through the said Postmaster-General thereof, a proposal in writing to carry the mails of the United States, subject to all of the requirements contained in the advertisement of the Postmaster-General dated September 16th, 1889, aforesaid, between the dates aforesaid, on route No. 76475, between the post-office at San Francisco, California, and the railroad stations, mail stations, and steamboat landings, and also between the several railroad stations and steamboat landings and mail stations, under the advertisement of the Postmaster-General dated September 16th, 1889, in the covered regulation wagons prescribed by the Department, for the sum of seven thousand seven hundred dollars ($7,700.00) per annum, and in case the said proposal was accepted, the said C. C. McCoy did propose and agree to enter into a contract, with

sureties to be approved by the Postmaster-General, within thirty (30) days after date of acceptance; and in said proposal the said C. C. McCoy did further state that he made the same after due inquiry into and with full knowledge of all particulars in reference to the service, and also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby; that said proposal was signed by the said C. C. McCoy, bidder, on the 9th day of November, 1889. And accompanying the said proposal was an oath duly taken by said C. C. McCoy before Marion D. Ekbert, a notary public of the State of Washington, and an officer qualified to administer oaths, and which oath was in compliance with section 245 of an act of Congress approved June 23, 1874, which said oath was as follows,

3 to-wit: I, C. C. McCoy, of Walla Walla, bidder for carrying the mail on the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Route No. 76475, between the post-office at San Francisco, Cal., and the railroad stations, mail stations, and steamboat landings, and also between the railroad stations, mail stations, and steamboat landing, as above, do swear that I have the ability, pecuniarily, to fulfill my obligations as such bidder; that the bid is made in good faith, and with the intention to enter into contract and perform the service in case said bid shall be accepted, which said oath was signed by the said C. C. McCoy, and duly sworn to before the said notary public on the 9th day of November, 1899. That on the said 9th day of November, 1889, the said Christopher C. McCoy, as principal, and the said defendants David W. Small and William O'Donnell, as sureties, made, executed, and delivered their bond and writing obligatory, dated on the said date, and signed and sealed by the said defendants, wherein and whereby they acknowledged themselves to be held and firmly bound unto the United States of America in the sum of thirty thousand dollars ($30,000.00) lawful money of the United States, to be paid to the said United States of America or their duly authorized officer or officers, to which payment well and truly to be made and done the said defendants, Christopher C. McCoy, David W. Small, and William O'Donnell, did bind themselves, their heirs, executors, and administrators, jointly, severally, and firmly, by the said bond, which was signed and sealed with the seals of the said parties on the 9th day of November, 1899.

4

II.

That the said bond so executed by the said defendants recited that whereas, by an act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1875, and for other purposes," it is provided that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by the Postmaster-General, in pursuance whereof, and in compliance with the provisions of said law, this bond is made and executed, subject to all the terms, conditions, and remedies thereon in said act provided and prescribed, to accompany the foregoing annexed proposal of the said Christopher C. McCoy, bidder; that said bond was conditioned that if the said bidder, as aforesaid, should within such time after his bid is accepted, as the

Postmaster-General had prescribed in said advertisement, to wit, within sixty (60) days of the acceptance of said bid, enter into a contract with the United States of America, with good and sufficient sureties, to be approved by the Postmaster-General, to perform the service proposed on said bid, and, further, to perform said service according to his contract, then the said obligation should be void, otherwise to be in full force and obligation in law, and in witness whereof, on the 9th day of November, 1889, the said Christopher C. McCoy, David W. Small, and William O'Donnell did sign and execute said bond.

5

III.

That the said bond was approved by Daniel Stewart, the postmaster at Walla Walla, Washington, on the 10th day of November, 1899, and was duly forwarded to the Post-Office Department of the United States, as required by law and the regulation of the said Department, and was by it received.

IV.

That said bid and proposal, so made by the said Christopher C. McCoy, was accepted by the Postmaster-General of the United States, and due notice thereof was given to the said bidder; and, thereafter, on the 21st day of January, 1890, a contract in writing was entered into between the United States of America, acting in that behalf by their Second Assistant Postmaster-General, and said Christopher C. McCoy, the said bidder, as contractor and principal, and the said William O'Donnell, Thomas Mosgrove, and D. W. Small, as sureties, in which contract it was recited, provided, and agreed that whereas the said C. C. McCoy had been accepted according to law as contractor for transporting the mails on Route No. 76475, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of San Francisco, California, under an advertisement issued by the Postmaster-General on the 16th day of September, 1889, for such service, which advertisement was referred to, and made by the said reference a part of said contract, and all new and additional service of said kinds which might at any time during the
6 term of the said contract be required in said city, at seven thousand seven hundred dollars ($7,700.00) per year for and during the term beginning the 1st day of July, 1890, and ending June 30, 1894; and that therefore the said contractor and his said sureties did jointly and severally undertake, covenant, and agree with the United States of America, and did bind themselves to carry said mail, using therefor wagons of the kind thereinafter described, in sufficient number to transport the whole of said mail, whatever might be its size, weight, or increase, during the term of said contract, and within the time fixed within the pamphlet advertisement of the Postmaster-General, dated September 16, 1889, and to further so carry said mail until the said schedule should be altered by the authority of the Postmaster-General, as therein provided, and then to carry the same according to said altered schedule, to carry the said mails in such a safe and secure manner, free from wet and other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service were

to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roofs; the rears were to be opened below by a gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door hinges or spring hinges, so arranged that it shall shut tight against the gate and lock. And that said
7 wagons were further described in said contract and it was agreed that in case it was desired to increase or decrease the size of such wagons that the said increase or decrease should be made in exact proportions as to height and length, the Postmaster-General reserving the right to vary at any time, when in his judgment the service might require, and plan or form of wagons to be used in the service. And, further, the said C. C. McCoy and his said sureties did agree to take the mail from, and deliver it into, the post-offices, mail stations and cars at such points, and at such hours, under the directions of the postmaster at San Francisco, California, aproved by the Postmaster-General, as would secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage; and to furnish the number of regulation wagons that, in the opinion of the postmaster at San Francisco, California, would be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that might be temporarily unserviceable, delayed waiting for trains or withdrawn from service for repairs; and to be accountable and answerable in damages to the United States, or to any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations in said contract assumed, or which might then or thereafter be imposed upon the said contractor by law in said behalf; and, further, to be answerable and accountable in damages for the careful and faithful conduct of person or persons who might be employed by the said contractor and to whom the
8 said contractor should commit the care and transportation of the mails, and for the faithful performance of the duties which were then or might thereafter by law be imposed upon such person or persons in the care and transportation of said mails; and, further, that the said contractor should not commit the care and transportation of the mail to any person under sixteen (16) years of age, or to any person not of good moral character, or who had not taken the oath prescribed by law, or who could not read and write the English language. Each driver, it was agreed, should wear when on duty the prescribed cap or hat prescribed in the pamphlet advertisement of September 16, 1889. And, further, to discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster-General so to do; and not to transmit by themselves, or any of them, or by their agents, and not to be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail; and to account for and pay over any money belonging to the United States which might come into the possession of the contractor, his sureties or employees; and that the foreign mails in transit across the territory of the United States should be deemed and taken to be mails of the United States; and to carry post-office blanks, mail locks and mail bags, and all other postal supplies; and to convey, whenever requisite to do so, one railway

post-office clerk, a substitute, or a messenger on the driver's seat of each wagon; and to perform all new or additional or changed covered
regulation wagon mail messenger, transfer, and mail station
9 service that the Postmaster-General may order at the city of San Francisco, California, during the term of said contract, without additional compensation, whether caused by change of location of post-office, stations, landings, or the establishment of others than those existing at the date thereof or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General might require, as a part of such new or additional service. For which service, when properly performed, and the evidence thereof should have been filed in the office of the Second Assistant Postmaster-General, the said C. C. McCoy, contractor, was to be paid by the United States the sum of seven thousand seven hundred dollars ($7,700.00) a year, quarterly, in the months of November, February, May, and August, through the postmaster at the city of San Francisco, California, or otherwise, at the option of the Postmaster-General, as thereinafter stipulated, or to be suspended and withheld in case of delinquency. And it was further stipulated and agreed by the said contractor and his sureties that the Postmaster-General might change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General might discontinue the entire service whenever the public interest, in his judgment, should require such discontinuance; but for a total discontinuance of service the contractor should be allowed one
month's extra pay as full indemnity. And it was further stipu-
10 lated and agreed in said contract that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that in said contract thereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor should forfeit, and there might be withheld from his pay, such sum as the Postmaster-General might impose as fines or deductions, according to the nature and frequency of the failure or delinquency. And, further, that the Postmaster-General might annul the said contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations of said contract; for transporting persons so engaged, as aforesaid; whenever the contractor should become a postmaster, assistant postmaster, or Member of Congress; and whenever, in the opinion of the Postmaster-General, the service could not be safely performed, the revenues collected, or the laws maintained. And, further, that such annulment should not impair the right of the United States to claim damages from said contractor and his sureties under said contract; but such damages might, for the purpose of setoff or counterclaim, in the settlement of any claim of said contractor, or his

11 sureties, against the United States, whether arising under said contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department. And it was further stipulated and agreed in said contract by the said contractor and his sureties that the said contract might, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or another contractor should be made by the Postmaster-General. And further, that no Member of or Delegate to Congress should be admitted to any share or part of said contract or to any benefit to arise therefrom; and further, that the said contract was to be subject to all the conditions imposed by law, and the several acts of Congress relating to post-offices and post-roads.

V.

Which said contract was signed by the said C. C. McCoy on the 10th day of January, 1890, and by the said sureties on the 21st day of January, 1890, and was signed by the Second Assistant Postmaster-General on the 3rd day of March, 1890; and that the said contract then and there became the binding obligation and agreement of the said-mentioned parties; and that the said Christopher C. McCoy, after signing the said contract on the 10th day of January 1890, took and subscribed upon the said contract an oath that he, the said Christopher C. McCoy, being employed in the care, custody, and conveyance of the mail as contractor on route No. 76475, being covered regulation wagon mail mes-
12 senger, transfer, and mail station service at San Francisco, California, would faithfully perform all of the duties required of him and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that he would honestly and truly account for and pay over any money belonging to the said United States which might come into his possession or control; and also that he would support the Constitution of the United States; which said oath was taken and subscribed to before M. D. Peck, a notary public in and for the District of Columbia, on the 10th day of January, 1890, and endorsed upon the said contract.

VI.

Plaintiffs further say that the said C. C. McCoy has failed and refused to comply with the contract hereinbefore mentioned, and the said sureties, and each of them, both on said bond and on said contract, have failed and refused to comply with said contract on behalf of the said C. C. McCoy; and the terms and conditions of the bond have not been complied with, as more particularly hereinafter stated, and the penalty mentioned in said bond is thereby incurred by the said C. C. McCoy and the said-mentioned sureties thereon, and the said bond is forfeited to these plaintiffs, as hereinafter more fully set forth.

VII.

That on the 14th day of March, 1890, the Postmaster-General permitted the said C. C. McCoy to sublet the said contract; and that

thereafter, from July 1, 1890, to June 30, 1894, the said con-
13 tract was sublet by the said C. C. McCoy, with the consent of the Postmaster-General, to one A. W. Branner, of San Francisco, California, at the rate of seven thousand five hundred dollars ($7,500.00) per annum. And from November 10, 1890, the Postmaster-General required the said contractor to perform additional service, making five (5) round trips daily, except Sunday, and two (2) round trips on Sunday, between the main post-office and railroad stations adjacent thereto, without additional compensation, in accordance with the terms of the said contract. That on the 3d day of January, 1891, the Postmaster-General did terminate the recognition of the subcontract of A. W. Branner, to be effective on the 30th day of November, 1890, and did on said date recognize the subcontract of N. Wines, of San Francisco, California, at nine thousand nine hundred dollars ($9,900.00) per annum from the 1st day of December, 1890, until the 30th day of November, 1891, agreeable to the request of the said C. C. McCoy. That from February 16th, 1891, the Postmaster-General required the said contractor to perform additional service between main post-office and Station E, 1.61 miles, eight (8) round trips daily, except Sunday, and one (1) round trip on Sunday, without additional compensation, in accordance with the terms of the said contract. And the said Postmaster-General from October 1, 1891, did require the contractor to supply Substation K, a mail station in the city of San Francisco, with mail on the trips between the main office and the Substation B, five (5) times a day, except Sunday, or more frequently if the same should be necessary, without increase of distance or pay, in accordance with the terms of
14 the said contract. That on the 8th day of May, 1893, the said C. C. McCoy and the said contractors did abandon the said contract and fail and refuse to perform the same. And on the 9th day of May, 1893, the Second Assistant Postmaster-General did notify the said C. C. McCoy, care of Zevely and Finly, of Washington, D. C., that unless the said C. C. McCoy should promptly put the service into operation he would be declared a failing contractor, and that the service would be relet at his expense and that his sureties would be held subject to the penalties of law, and that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of the service of the said contractor at the rate of seventeen thousand five hundred dollars ($17,500.00) per annum; and on May 17th, 1893, the said C. C. McCoy having failed to perform the service on route No. 76475, an order was made by the Second Assistant Postmaster-General declaring the said C. C. McCoy a failing contractor; that the said C. C. McCoy having been so declared a failing contractor, and proposals for service for the remainder of the term having been invited, and proposals being received, the contract for the performance of the service agreed to be performed by the said C. C. McCoy under the said contract and in carrying the mails as required under the said route No. 76475 the contract for the remainder of the service from August 14th, 1893, to June 30th, 1894, was awarded to Max Popper, of San Francisco, California, at the rate of twelve thousand dollars ($12,000) per annum, this being the lowest bid received, and the said contract being so awarded by W. S. Bissell, Postmaster-
15 General. And thereafter until the completion of the said term,

the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do.

VIII.

That by reason of the failure of the said C. C. McCoy to carry the mails as he had agreed to do in his said contract, these plaintiffs were compelled to procure temporary service, and one J. M. Gorman did carry the mail under the said proposal, and as the said C. C. McCoy was compelled to do under the said contract, from May 5th to August 13th, 1893, for which services these plaintiffs did pay the said J. M. Gorman the sum of four thousand eight hundred and twenty-seven dollars and seventy-seven cents (4,827.77). And that during the third quarter of the year, 1893, for failure to perform the service as agreed, the said C. C. McCoy was fined five dollars ($5.00), which said amounts are claimed as damages against the defendants herein. That the difference between the contract of the said C. C. McCoy at seven thousand seven hundred dollars ($7,700.00) per annum, and the contract of the said Max Popper at twelve thousand dollars ($12,000.00 per annum, from the 4th day of August, 1893, and the 30th day of June, 1894, was the sum of three thousand seven hundred and eighty-five dollars and eighty-seven cents ($3,785.87), which said amounts were properly chargeable to the said mentioned defendants. That as an offset to the said claim, for actual damages sustained by the Government, as aforesaid, the
16 defendant, C. C. McCoy and his said sureties are entitled to have deducted the amount of the transportation from April 1st to August 13th, 1893, which the said C. C. McCoy would have received had he complied with his said contract, to wit, the sum of two thousand eight hundred and forty-five dollars and sixty-five cents ($2,845.65). And due demand upon the said C. C. McCoy and the said defendants herein has been made by the plaintiffs for the amount due, but the said defendants and each of them have failed and refused, and do still fail and refuse to pay the same.

IX.

That all of the said contract was fully complied with on the part of these plaintiffs.

Wherefore, plaintiffs pray judgment against the said C. C. McCoy, William O'Donnell, Thomas Mosgrove, and D. W. Small, in the sum of five thousand seven hundred and seventy-two dollars and ninety-nine cents (5,772.99), actual damages sustained by these plaintiffs by reason of their failure to perform the said contract, and for their costs and disbursements in this action.

WM. H. BRINKER,
United States Attorney.
F. C. ROBERTSON,
Assistant United States Attorney,
Attorneys for Plaintiffs.

Due service this day acknowledged by receipt of copy, March 29, 1897.

THOMAS & DOVELL,
Attorneys for Defendants.

17 (Endorsed:) Filed March 29, 1897, in the United States circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

In the circuit court of the United States for the district of Washington, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, William O'Donnell, and Thomas Mosgrove, defendants. } No. 137.

Answer.

Come now the above-named defendants and for answer to the complaint of plaintiffs herein deny the same and each and every allegation therein contained.

THOMAS & DOVELL,
Attorneys for Defendants.

STATE OF WASHINGTON,
County of Walla Walla, ss:

Thomas Mosgrove, being first duly sworn, deposes and says: I am one of the defendants above named, know the contents of the foregoing answer, and believe the same true.

THOMAS MOSGROVE.

18 Subscribed and sworn to before me this 8th day of May, 1897.

[SEAL.] J. G. THOMAS,
Notary Public, residing at Walla Walla, Washington.

(Endorsed:) Filed May 10, 1897, in the United States circuit court. A. Reeves Ayers, clerk. By Chas. B. Johnston, deputy.

In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Trial.

Now, on this 15th day of November, 1899, this cause coming on regularly for trial, the plaintiffs being represented by W. R. Gay, esq., United States attorney, and C. E. Claypool, esq., assistant United States attorney, and the defendants represented by W. T. Dovell, esq., a jury being called, come and answer to their names as follows: Frank Hansen, Cyrus Davis, A. Mathoit, S. M. Davis, Chas. D. Chard, Jas. Fudge, M. M. Hart, Archie Dunnigan, J. L. Robinson, Wm. O'Rourke, Chas. Maxson, B. B. Witt—twelve good and lawful men, duly
19 impaneled and sworn, the cause proceeds by the introduction of documentary evidence, at the close of which, the hour of adjournment having arrived, the further hearing of this cause is continued until 9.30 o'clock to-morrow morning.

In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Order for entry of judgment.

Now, on this 16th day of November, 1899, the hour of 9.30 o'clock having arrived, the jury in this cause being called, all answer to their names, all being present in their box, this cause proceeds. The counsel for the Government rests its cause. Whereupon the counsel for defendants moves the court for a judgment of nonsuit, and the court, after hearing argument of respective counsel, grants said motion and a judgment of nonsuit is allowed, and the jury are discharged from further consideration of the cause.

20 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Order granting motion for nonsuit.

This cause came on to be heard on the 15th day of November, 1899, plaintiff appearing by Charles E. Claypool, assistant United States attorney, and defendants appearing by W. T. Dovell, their attorney, a jury being called are duly sworn to try said cause, and thereupon and at the close of the evidence introduced on behalf of plaintiff the said defendants and each of them move the court for a judgment of nonsuit because of the legal insufficiency of plaintiff's evidence to make out a prima facie case, and after argument of counsel, the court being advised in the premises, said motion for nonsuit is granted.

To which order granting said motion plaintiff, by its attorney, duly excepts, which exception is allowed.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed November 16, 1899. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

21 In the circuit court of the United States for the district of Washington, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, William O'Donnell, and Thomas Mosgrove, defendants. } No. 137.

Assignment of errors on first appeal.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it is averred occur'ed on trial of the cause, to wit:

1st. The court erred in holding that the duly certified records, orders, balances, certificates and other papers and documents of the office of the Auditor for the Post-Office Department and from the other Departments of the Government, in relation to this said cause, as they were introduced and admitted upon the trial thereof in behalf of the plaintiff, did not make out a prima facie case against the defendants and each of them.

2d. The court erred upon the conclusion of the testimony for the plaintiff in granting the motion of the defendants for a judgment of
22 nonsuit, because of the legal insufficiency of the evidence of plaintiff to make out a prima case.

3d. The court erred in discharging the jury from further consideration of the case, as plaintiff had made out a case entitling it to judgment for the amount prayed for in its complaint.

4th. For other errors occurring upon the record and duly excepted to at the time by the plaintiff.

WILSON R. GAY,
United States Attorney.
C. E. CLAYPOOL,
Assistant United States Attorney.

(Endorsed:) Filed in the United States circuit court, district of Washington, February 1, 1900. A Reeves Ayres, clerk. By R. M. Hopkins, deputy.

UNITED STATES OF AMERICA, *ss.*

The United States circuit court of appeals for the ninth circuit.

Writ of error on first appeal.

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of Washington, ninth judicial circuit court, greeting:

Because in the record and proceedings as also in the rendition of the judgment and order of nonsuit of a plea which is in the said circuit
23 court before you, or some of you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

24 Due and full service of within acknowledged this 3d day of February, 1900.

W. T. DOVELL,
Attorney for Defendants.

UNITED STATES OF AMERICA, *ss.*

Mandate.

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Washington, southern division, greeting:

Whereas lately in the circuit court of the United States for the district of Washington, southern division, before you, or some of you, in a cause between the United States of America, plaintiff, and C. C. McCoy et al., defendants, No. 137, a judgment was duly filed and entered, which said judgment is of record in said cause in the office of the clerk of said circuit court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the ninth circuit by virtue of a writ of error agreeably to the act of Congress in such cases made and provided, fully and at large appears;

And whereas on the 10th day of May, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before
25 the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with instructions to said circuit court to take further action in accordance with the opinion of this court.

(Oct. 8, 1900.)

You, therefore, are hereby commanded that such action and proceedings be had in said cause, in accordance with the opinion and judgment of this court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said circuit court notwithstanding.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and one.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Filed in the United States circuit court, district of Washington, May 7th, 1901. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

26 In the United States circuit court of appeals for the ninth circuit.

UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and Thomas Mosgrove, defendants in error. } No. 599.

MONDAY, *Oct. 8, 1900.*

Opinion of circuit court of appeals.

Appeal from the United States circuit court, district of Washington, southern division.

This suit was brought by the United States against C. C. McCoy, as principal, and David W. Small, William O'Donnell, and Thomas Mosgrove, as bondsmen, for $5,772.99 and interest, alleged to be the amount of actual damages sustained by the United States on account of the failure of McCoy to perform a contract entered into by him with the United States for the transportation of mail matter on route No. 76475. On the *the* trial of the cause the court below granted a motion for a judgment of nonsuit "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case." The case is now before this court upon the assigned error of this ruling.

27 It appears that on January 10, 1890, the defendant in error C. C. McCoy and his codefendants as bondsmen entered into a contract with the United States for the transportation of mail in the city of San Francisco, California, under which the said McCoy was to furnish certain equipment for carrying the mails and to perform certain service described in the advertisement of the Postmaster-General of September 16, 1889, inviting proposals for such service, and to perform all new or additional service of the same character which might at any time during the term of said contract be required in said city, for the sum of $7,700 per year. The term of the contract extended from July 1, 1890, to June 30, 1894. McCoy proceeded with his undertaking, being permitted by the Postmaster-General to sublet the said contract on two different occasions, first, to A. W. Branner for the sum of $7,500 per annum, and second, on the 1st day of December, 1890, to N. Wines, for the sum of $9,900 per annum. From November 10, 1890, the Postmaster-General required the contractor to perform additional service without additional compensation, in accordance with the terms of the contract; from February 16, 1891, a further service was required; and from October 1, 1891, still further service. It is alleged that on the 8th day of May, 1893, the said McCoy and the said subcontractors abandoned the said contract and failed and refused to perform the same; that on the following day said McCoy was notified by the Post-Office Department that unless he should promptly put the service into operation he
28 would be declared a failing contractor, that the service would be relet at his expense, and that his sureties would be held subject

to the penalties of law; also, that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of service of the said contractor, at the rate of $17,500 per annum; and on May 17, 1893, said McCoy having failed to perform the service on Route No. 76475, an order was made by the Second Assistant Postmaster-General declaring the said C. C. McCoy a failing contractor.

It is further alleged that by reason of this failure of the said McCoy to carry the mails as agreed, the Government was compelled to procure temporary service from May 5th to August 13, 1893, for which services the amount of $4,827.77 was paid; that in addition to this amount the said McCoy was fined $5 for failure to perform the agreed service during the third quarter of the year 1893.

A contract was awarded to one Max Popper, of San Francisco, for the performance of the service during the remainder of the term, namely, from August 14, 1893, to June 30, 1894, at the rate of $12,000 per annum, this being the lowest bid obtainable, and in accordance therewith the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do. The difference between the amount of the contract to McCoy and that to Popper for the specified time is $3,785.87, which is claimed to be chargeable to the defendants in error. As an offset to this claim credit is given for the amount the said McCoy would have been entitled to receive had he complied with his contract to the end of the term, to wit, $2,845.65, leaving a remainder of
29 $5,772.99, the actual damage claimed by the plaintiff by reason of the failure of McCoy to perform said contract.

The defendants made a general denial to the allegations of the complaint. On the hearing of the case the plaintiff put in evidence certain documents, as follows: A certified copy from the records in the Auditor's office of the Post-Office Department of the account of C. C. McCoy as failing contractor for amount of actual damage to the United States; certified copy of postmaster of Walla Walla, Washington, to the Auditor, that said postmaster had made demand on C. C. McCoy and upon two of his sureties for payment of $30,000; a certified copy of account for amount of bond of C. C. McCoy, failing contractor; copy of proposals and advertisements to bidders for mail transportation service; copy of contract and bond entered into by the defendants in error with relation to the transportation of mails on Route No. 76475; recognitions by the Postmaster-General of subcontractors for the service under this contract; requirements of Postmaster-General for additional service by contractor; two telegrams from postmaster at San Francisco to Department at Washington, D. C., regarding abandonment of service by McCoy; communications to the defendants from Post-Office Department regarding failing contract; orders of Postmaster-General declaring McCoy a failing contractor and recognizing contracts for temporary service with J. N. Gorman and for service for balance of term with Max Popper; contract and bond of Max Popper for this service to completion of term; statements of various fines imposed upon McCoy while acting as contractor.

30 No other evidence was offered by the plaintiff, and its case rested upon this showing.

Wilson R. Gay, United States attorney, and Chas. Ethelbert Claypool, assistant United States attorney, for plaintiffs in error.

W. T. Dovell, attorney for defendants in error.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, after the foregoing statement of facts, delivered the opinion of the court.

A material allegation of the complaint was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." The general denial of the answer placed this allegation of the complaint in issue, and it devolved upon the plaintiff at the trial to establish the fact alleged by competent proof. The statement of McCoy's account by the Auditor of the Post-Office Department; the telegram of the postmaster at San Francisco to the Second Assistant Postmaster-General, dated May 8, 1893, stating that the contract had been abandoned; the letter of the Second Assistant Postmaster-General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary service for the route; the certificate of the Postmaster-General, dated May 18, 1893, delaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the per-
31 formance of his contract. The postmaster at San Francisco appears to have had knowledge of the fact, and all the subsequent proceedings were based upon his statement of the fact in the telegram to the Second Assistant Postmaster-General, but his testimony as to the fact was not obtained in this case. Section 3962 of the Revised Statutes provides that the Postmaster-General may make deductions from the pay of contractors for failures to perform service according to contract, and he is authorized to impose fines upon them for other delinquencies; but this authority does not extend to the making of a certificate that a contractor has wholly abandoned his contract, nor does it provide that if such a certificate is made it shall be admitted in evidence as proof of the fact of abandonment in support of a claim for damages incurred by reason of the increased expense of the service under a new contract. The court was therefore right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract. But the statement of the account contains a charge of five dollars for a fine imposed by the Postmaster General upon the contractor for a delay of 16 hours on July 5, 1893, in dispatching 11 pouches of mail for the S. F. & S. C. R. P. O. The evidence that this fine was imposed is contained in a document authenticated by the Postmaster-General under the seal of the Department, as required by section 882 of the Revised Statutes, which provided that copies of
32 any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. The document reciting the action of the Postmaster-General in imposing this fine, authenticated in accordance with this section of the Revised Statutes, was offered and admitted in evidence, and was prima facie evidence that the fine had been imposed as authorized by section

3962 of the Revised Statutes. The accounting officers of the Post-Office Department may certify to facts which come under their official notice. (U. S. v. Jones, 8 Peters, 375, 384; Bruce v. U. S., 17 How., 437, 441.) They had this evidence before them, and it was official information that the fine had been imposed. The statement of account was therefore prima facie evidence of this charge of five dollars, and, if this evidence was not overcome by competent proof, entitled the United States to a verdict and judgment for that amount.

Judgment reversed, with instructions to the court below to take further action in accordance with this opinion.

(Endorsed:) Opinion filed Oct. 8, 1900. F. D. Monckton, clerk.

(Endorsed:) Filed in the United States circuit court, district of Washington. May 8th, 1901. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

33 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, William O'Donnell, and Thomas Mosgrove, defendants. } No. 137.

Trial.

Now, on this 9th day of May, 1901, this cause coming on regularly for trial, the plaintiff being represented by Edward E. Cushman, assistant United States attorney, and the defendants being represented by W. T. Dovell, esq., a jury being called came and answer to their names as follows: John Chandler, H. O. Peck, J. D. Burns, D. G. Ferguson, H. C. Phillips, Isaac O'Dell, Benj. Pranger, Harry Riffle, Geo. Snell, H. B. Kershaw, Fred W. Thiel, Bert. E. LaDue—twelve good and lawful men, duly impaneled and sworn to try the cause. The counsel for the Government moves the court for a continuance of the cause, which motion is denied, and exception allowed. The cause now proceeds by the introduction of documentary evidence on behalf of the plaintiff, and plain-
34 tiff rests its case; the defendants offering no evidence, the cause is submitted without argument. Whereupon the court instructs the jury to return a verdict for the plaintiff; to the instructions given the counsel for the plaintiff excepts, and the exception is allowed; and now the jury, under the instruction of the court, return the following verdict:

"We, the jury in the above-entitled cause, do find for the plaintiffs, and assess and allow as the amount of damages recoverable herein the sum of five dollars, this verdict being in accordance with the peremptory instructions of the court.

"H. B. KERSHAW,
"*Foreman.*"

Whereupon the jury are discharged from further consideration of the cause.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Notice.

To the above-named defendant and to W. T. Dovell, esq., their attorney:

35 You are hereby notified and required to take notice that the plaintiff has filed its motion for a new trial herein, a copy of which said motion is herewith served upon you.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

Due service of the above notice and motion for new trial admitted this 10th day of May, 1901.

W. T. DOVELL,
Attorney for Defendants.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Motion for new trial.

Comes now the plaintiff, by Edward E. Cushman, assistant United States attorney, and respectfully moves the court for a new trial of the above-entitled cause, on the ground of errors in law occurring at the trial and excepted to at the time by the plaintiff.

This motion is based upon the minutes of the court and the record and proceedings on file herein.

EDWARD E. CUSHMAN.
Assistant United States Attorney.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

36 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Order denying motion for new trial.

This matter coming on regularly upon plaintiff's motion for a new trial herein, plaintiff appearing by Edward Cushman, assistant United

States attorney, and defendants appearing by W. T. Dovell, their attorney, and the court having listened to counsel and being fully advised, the said motion is denied, to all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 11 day of May, 1901.

C. H. HANFOR , *Judge.*

(Endorsed:) Filed May 11, 1901. A. Reeves Ayers, clerk. By R. M. Hopkins, deputy.

37 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Judgment.

This matter coming on regularly for hearing on this 11th day of May, 1901, the plaintiff appearing by Edward E. Cushman, assistant United States attorney, and the defendants appearing by W. T. Dovell, their attorney; a jury having heretofore regularly returned into this court a verdict against the defendants and in favor of the plaintiff for five dollars ($5.00), and the motion for a new trial having been made and denied herein:

It is therefore ordered, adjudged, and directed that the plaintiff have and recover from the defendants, and each of them, the sum of five dollars and its costs and disbursements herein, to be hereafter taxed according to law and the practice of this court; and interest on the principal sum at the rate of six per cent per annum from this date until paid; and that execution issue therefor.

C. H. HANFORD, *Judge.*

38 And now at the time of the rendition of this judgment the plaintiff excepts thereto, and said exception is allowed by the court.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Petition for writ of error.

Now comes the United States of America, plaintiff, by Wilson R. Gray, United States attorney, and Edward E. Cushman, assistant United States attorney, and say that on or about the 9th day of May, 1901, this court entered an order denying a continuance of the trial of the above-

entitled cause, in which said order refusing said motion for a continuance certain errors were committed to the prejudice of the plaintiff; and that thereafter such proceedings were had and done that said cause proceeded to a trial by jury and certain instructions were given and
39 refused by the court upon such trial, in which instructions given and refused certain errors were committed by the court to the prejudice of the plaintiff; and that thereafter the court denied plaintiff's motion for a new trial herein, in doing which the court committed further errors to the prejudice of the plaintiff; and that thereafter a judgment was entered by this court herein, wherein certain other errors were committed by the court to the prejudice of the plaintiff, all of which said errors will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the ninth circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

WILSON R. GAY,
United States Attorney.
EDWARD E. CUSHMAN,
Assistant United States Attorney.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

40 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Assignment of errors.

Comes now the plaintiff in this case by Wilson R. Gay, United States attorney, and Edward E. Cushman, assistant United States attorney, and in connection with its petition for a writ of error, makes the following assignment of errors, which it is averred occurred upon the judgment and trial of this cause and prior thereto:

1st. The court erred in holding that the plaintiff was not entitled to a continuance upon the showing and affidavit made and filed by it for that purpose.

2d. The court erred, upon the completion of the plaintiff's testimony, no testimony being introduced by the defendants, to give the instruction requested by plaintiff's counsel.

3d. The court erred in giving the instruction requested by defendants' counsel, and in holding that the duly certified records, orders, balances, certificates, accounts, and other papers and documents from the
41 office of the Auditor of the Post-Office Department in relation to said cause, as introduced and admitted upon the trial thereof in behalf of the plaintiff, did not make out a prima facie case against the defendants and each of them.

4th. The court erred in refusing to grant plaintiff's motion for a new trial.

5th. The court erred in entering its judgment upon said verdict.

WILSON R. GAY,
United States Attorney.
EDWARD E. CUSHMAN,
Assistant United States Attorney.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Order allowing writ of error.

On the 11th day of May, 1901, came the plaintiff, by Wilson R. Gay, United States attorney, and Edward E. Cushman, assistant United States attorney, and filed herein and presented to the court its petition
42 praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, proceedings, and papers upon which the order and judgment herein was made and rendered, duly authenticated, be sent to the United States circuit court of appeals for the ninth circuit, and that such other and further proceedings be had as may be proper in the premises. In consideration whereof, the court does allow the writ of error.

C. H. HANFORD,
United States District Judge, presiding in said Circuit Court.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

UNITED STATES OF AMERICA, *ss:*

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Writ of error.

The President of the United States of America, to the honorable judges of the circuit court of the United States for the district of Washington, ninth judicial circuit, greeting:

43 Because in the record and proceedings, as also in the rendition of the judgment and order denying motion for a new trial in the

above-entitled cause and action, which is in the said circuit court before you or some of you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given and said order therein made, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the Ninth circuit, together with this writ, that you have the same at the city of San Francisco, in the State of California, within thirty days from the 10th day of May, 1901, in the said circuit court of appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of May, in the year of our Lord one
44 thousand nine hundred and one, and of the independence of the United States the one hundred and twenty-fifth.

[SEAL.] A REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

This writ hereby allowed this 11th day of May, 1901.

C. H. HANFORD,
United States District Judge, Presiding in said Circuit Court.

Due and full service of the foregoing writ of error acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Defendants.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

45 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Citation.

The President of the United States, greeting, to C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the ninth circuit, to be

holden at the city of San Francisco, in said circuit, within thirty days from the 10th day of May, 1901, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, southern division, wherein the United States of America is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered in favor of the plaintiff in error for the sum of five dollars and costs on the 11th day of May, 1901,
46 as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States of America the one hundred and twenty-fifth.

[SEAL.] C. H. HANFORD,
United States District Judge, Presiding in said Circuit Court.

Due and full service of the above citation in behalf of appellees acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Appellees and Defendants.

(Endorsed:) Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. MCCOY ET AL., DEFENDANTS. } No. 137.

Plaintiff's proposed bill of exceptions.

This cause coming on regularly for hearing and trial on the 9th
47 day of May, 1901, at ten o'clock a. m., and a jury being duly impaneled and sworn to try said cause, an adjournment was taken until two o'clock of said day, at which time the plaintiff made a motion and affidavit for a continuance in words as follows:

"In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. MCCOY ET AL., DEFENDANTS. } No. 137.

"*Motion.*

"Comes now the plaintiff by Edward E. Cushman, assistant United States attorney, and moves the court that the above-entitled cause and the trial thereof be continued over the present term, on the ground of the absence of material evidence and the witness T. J. Ford of San Francisco, California, a material witness upon the trial of the above-entitled cause, and in support of said motion refers to the records and

files in this cause and his, the said Edward E. Cushman's, affidavit, herewith filed, and the files and record of this cause on appeal to the circuit court of appeals for the ninth circuit, heretofore made herein, and the opinion rendered upon said appeal.

"EDWARD E. CUSHMAN,
"*Assistant United States Attorney.*"

48 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. MCCOY ET AL., DEFENDANTS. } No. 137.

Affidavit of Edward E. Cushman.

UNITED STATES OF AMERICA,
District of Washington, ss:

Edward E. Cushman, being first duly sworn, upon oath deposes and says: That he is the attorney for the plaintiff and assistant United States attorney for the district of Washington; that he can not proceed at this time to the trial of the above-entitled cause, on account of the absence of material evidence and the absence of the witness by the name of T. J. Ford residing at San Francisco, California, upon whom he, affiant, depends for such material evidence; that upon the former trial of this cause and upon the decision of the appeal taken from the judgment of nonsuit at that time, it was ruled and decided both in this court and in the court of appeals that in order to make out a prima facie case in such action as this it was necessary to show, in addition to the

49 certified transcripts from the office of the Auditor of the Post-Office Department and other record evidence in the Post-Office Department, by parol or other evidence, a breach of the contract by the defendant C. C. McCoy to carry mail and deliver the same in the city of San Francisco, as pleaded in the amended complaint in this action; that the only witness of whom affiant has or had any knowledge that could testify to this matter was the above-named T. J. Ford, of San Francisco, who is now and was at the time of alleged breach of the contract herein sued on, to wit, on May 8th, 1893, superintendent of mails in the city of San Francisco; that as such it was his duty and he did superintend the receipt and delivery at the post-office in San Francisco by the defendant C. C. McCoy of all mails coming into the city of San Francisco, and likewise superintended and oversaw and had knowledge of the delivery to the said C. C. McCoy of all outgoing mails at the post-office in San Francisco; and that the said T. J. Ford would, if present at the trial of this cause, testify that the said defendant C. C. McCoy, his agents, and servants, in the city of San Francisco, California, on the 8th day of May, 1893, absolutely and wholly abandoned his performance of the contract in that city to carry and transmit the United States mails from the various stations in that city to the post-office, and from the post-office to such various stations, during the term of said contract as set up in the said amended complaint, from the 1st day of July, 1890, to the last day

of June, 1894; that upon said eighth day of May, and ever after
50 that date, the said defendant C. C. McCoy, his agents, and servants, wholly failed, neglected, and refused to carry, deliver, or transmit from or to said post-office and said stations in said city of San Francisco any of the United States mails, as he had contracted and agreed to do, or offer or attempt so to do.

Affiant further states that due diligence has been used to procure such evidence and the presence of said witness upon this trial; that on the 29th day of April, 1901, affiant filed herein a præcipe for subpœna for such witness, which is among the files in this case, and to which affiant refers; that affiant is informed and believes that said subpœna was immediately issued upon the filing of said præcipe and delivered to the United States marshal of this district for service, returnable May 9, 1901; that affiant has this day, when this cause was called for trial and the absence of said witness ascertained, wired the postmaster at San Francisco and the United States marshal at Seattle, to ascertain whether said witness had been subpœnaed—if so, when—and whether he was on his way to attend upon this court as a witness in this case; that affiant is unable the cause of the absence of said witness, having received no answer to either of said telegrams at this the hour of two o'clock p. m.; that if said cause is continued for a later day in this term, or over this term, the attendance of said witness will be secured and no delay interposed in the trial of said cause on account of the absence of said witness.

EDWARD E. CUSHMAN.

51 Subscribed and sworn to before me this 9th day of May, 1901.

[SEAL.] A. REEVES AYRES, *Clerk.*
By H. B. STRONG,
Deputy Clerk, United States Circuit Court.

The court in denying said motion said: "It is a good deal of a question in my mind whether the Government is entitled to have a fair trial on the issue as to the abandonment of the contract. I set the case down for trial because I was asked to by the assistant attorney for the United States, and no opposition was made to it. The mandate from the circuit court of appeals does not award a new trial. The court sustained the judgment of this court as to the main issue in the case, but held that the court erred in granting a nonsuit, because there was evidence enough in the case on the trial to warrant a recovery on the part of the United States in the sum of five dollars. That is the opinion of the court, and the mandate simply reverses the judgment and remands the cause here for further proceedings in accordance with that opinion. It is not remanded here with a mandate to award a new trial. Now, there is another reason why this application for a continuance is not sufficient. There is no showing of proper diligence under the statute. This witness could not be required to attend this court if a subpœna was served on him. No steps appear to have been taken to obtain his deposition, which would be the only process of the court that
52 could be enforced to obtain his evidence. Section 876 expressly provides that in civil cases witnesses living out of the district in which the court is held and a greater distance than one hundred miles

from the place of holding the same can not be compelled to attend. The motion for a continuance is denied."

To which ruling of the court the plaintiff duly excepted and its exception was allowed.

Whereupon plaintiff opened its case, and there was offered and admitted in evidence a transcript from the Post-Office Department, which transcript, and the certificate attached thereto, and the portions thereof admitted in evidence, were as follows:

Certificate to account for amount of actual damage.

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE POST-OFFICE DEPARTMENT,
June 1, 1895.

I, Geo. A. Howard, Auditor of the Post-Office Department, do hereby certify the annexed to be a true and correct statement from the records of this office of the account, for amount of actual damage to the United States, of C. C. McCoy, failing contractor, on route No. 76475, in the State of California, pertaining to his accounts in the office of the Auditor for the Post-Office Department.

In testimony whereof I have hereunto signed my name and
53 caused to be affixed my seal of office at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] GEO. A. HOWARD,
Auditor for the Post-Office Department.

Statement of account for amount of actual damage.

DR. *C. C. McCoy (Cal.), failing contractor, in account with the United States.* CR.

Route 76475	To amount paid J. M. Gorman for temporary service from May 5 to August 13, 1883.....	$4,827.77	Route 76475	By transportation from April 1 to August 13, 1893	$2,845.65
"	To amount of fine, 3d quarter, 1893	5.00		By balance.....	5,772.99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894	3,785.87			
		$8,618.64			$8,618.64
	To balance	$5,772.99			

Treasury Department,
Office of the Auditor of the Treasury for the
Post-Office Department, Washington, D. C., June 1, 1895,
GEO. A. HOWARD, *Auditor.*

(Endorsed:) Statement of actual damage account. Failing contractor. Route 76475. State of California. Name, C. C. McCoy, Walla Walla, Washington. Sureties on contract, W. O'Donnell, D. W. Small, T. Mosgrove, Walla Walla, Washington. Bond, $30,000. Actual damage, $5,772.99.

(Endorsed:) 137. C. C. Plfs. Ex. B. Nov. 15, 1899. Filed April 2, 1899, in the U. S. circuit court. A. Reeves Ayres, clerk. By H. B. Strong, deputy. No. 599. U. S. circuit court of appeals for the ninth circuit. Defendants' Exhibit B. Received March 26, 1900. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

54 PLAINTIFFS' EXHIBIT A.

Certificate to evidence of demand.

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE POST-OFFICE DEPARTMENT.

I, Geo. A. Howard, Auditor for the Post-Office Department, do hereby certify the annexed to be a true and correct copy of the original certificate, now on file in this office, of Wm. O. Fallon, postmaster at Walla Walla, in the State of Washington, pertaining to the accounts of C. C. McCoy, failing contractor on route No. 76475, in the State of California, in the office of the Auditor for the Post-Office Department.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.]

GEO. A. HOWARD,
Auditor for the Post-Office Department.

POST-OFFICE,
Walla Walla, Wash., March 30, 1895.

I, Wm. O. Fallon, postmaster at Walla Walla, Washington, employed by the Auditor of the Treasury for the Post-Office Department for that purpose, hereby certify that I made demand for payment of draft No. 5628, for $30,000.00, on C. C. McCoy, failing contractor, at Walla Walla,
55 Washington, by letter mailed on the 1st day of March, 1895, addressed to the said failing contractor at Walla Walla, Washington, his last usual place of abode; that a sufficient time has elapsed in the ordinary course of mail for said letter to have reached its destination and a reply to have been received; and that payment of said draft, in whole or in part, has not been received within the time designated in my instructions from the Auditor of the Treasury for the Post-Office Department, to wit, thirty days.

I further certify that I made demand for payment of said draft upon D. W. Small and W. O'Donnell, the sureties of said failing contractor, by letter mailed on the 1st day of March, 1895, addressed to them at Walla Walla, Washington (payment of draft refused; see replies from C. C. McCoy and W. O'Donnell, no response from D. W. Small), their last usual place of abode; that a sufficient time has elapsed in the ordinary course of mail for said letters to have reached their destination

and replies to have been received, and that payment of said draft, or any part of it, has not been received within the time designated in my said instructions from the Auditor of the Treasury for the Post-Office Department.

WM. O. FALLON,
Postmaster.

(Endorsed:) Filed April 2, 1899, in the United States circuit court. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

56 *Certificate to account for amount of bond.*

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE POST-OFFICE DEPARTMENT,
June 1, 1895.

I, Geo. A. Howard, Auditor for the Post-Office Department, do hereby certify the annexed to be a true and correct statement from the records of this office of the account, for amount of bond of C. C. McCoy, failing contractor on Route No. 76475, in the State of California, pertaining to his accounts in the office of the Auditor for the Post-Office Department.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.]

GEO. A. HOWARD,
Auditor for the Post-Office Department.

POST-OFFICE DEPARTMENT,
Washington, D. C., February 7, 1899.

I certify that the annexed are true copies taken from the files and records of this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post-Office Department to be affixed, the day and year above written.

[SEAL.]

A. EMORY SMITH,
Postmaster-General.

57 U. S. advertisement of September 16, 1889, inviting proposals for covered regulation wagon mail, messenger, transfer, and mail station service at New Orleans, La., Omaha, Nebr., and San Francisco, Cal., from July 1, 1890, to June 30, 1894. John Wanamaker, Postmaster-General.

[Cut of eagle here.]

Proposals received until 4 p. m. of December 14, 1899. Decisions announced January 7, 1890. Contracts to be returned to the Department, duly executed, within thirty days from date of acceptance.

Proposals for covered regulation wagon mail messenger, transfer, and mail-station service.

POST-OFFICE DEPARTMENT,
Washington, D. C., September 15, 1889.

Proposals will be received at the contract office of this Depart-
58 ment until 4 p. m. of December 14, 1889, for carrying the mails of the United States in the covered regulation wagons prescribed by the Department, on the routes herein specified in the States of Louisiana, Nebraska, and California, being covered regulation wagon mail messenger, transfer, and mail-station service in the cities hereinafter named, between the post-offices, the railroad stations, the station offices, and the steamboat landings, between the several stations and landings and railroad depots, and between the post-offices and railroad stations, between the post-offices and station offices, and between the post-offices and steamboat landings and railroad depots, as prescribed herein, for the term below stated, viz:

New Orleans, La.
Omaha, Nebr.
San Francisco, Cal.

From July 1, 1890, to June 30, 1894.

Decisions announced on or before January 7, 1890.

Contracts to be returned to the Department, duly executed, within thirty days from date of acceptance of proposals.

Also from post-office to steamboat landing, 5,000 feet, more or less, about six trips a week, and about three trips a week from steamboat landing to post-office.

Bond required with bid, $10,000; check required with bid, $205.
Bond required with bid, $6,000; check, $150.
Bond required with bid, $30,000; check, $400.

59

ROUTE No. 49101.

COVERED REGULATION WAGON MAIL MESSENGER SERVICE AT NEW ORLEANS, LA.

Number of wagon trips required for the performance of the service from railroad stations and steamboat landings to post-offices.

Railroad station or steamboat landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Illinois Central Railroad	6,600	2	2	.....	14	30
New Orleans and Northeastern Railroad	5,280	2	2	.....	14	35
Texas and Pacific Railroad	5,170	2	2	.....	14	35
Morgan's Louisiana and Texas Railroad	4,057	2	2	.....	14	30
Louisville, New Orleans and Texas Railroad	3,960	2	2	.....	14	30
Louisville and Nashville Railroad	756	2	2	.....	14	25
New Orleans and Gulf Railroad	8,976	2	2	.....	14	10
New Orleans and Port Vincent wharf	6,725	1	0	.....	6	30
New Orleans and Grand Isle wharf	875	*	*	*	*	30
East Louisiana Railroad	5,280	*	*	*	*	10
		1	1	.....	7	35

*Two trips a week.

ROUTE No. 49101—Continued.

Number of wagon trips required for the performance of the service from post-office to railroad stations and steamboat landings.

Railroad station or steamboat landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Min.*
Illinois Central Railroad	6,600	2	2	.....	14	30
New Orleans and Northeastern Railroad	5,280	2	2	.....	14	25
Texas and Pacific Railroad	5,170	2	2	.....	14	25
Morgan's Louisiana and Texas Railroad	4,057	2	2	.....	14	20
Louisville, New Orleans and Texas Railroad	3,950	2	2	.....	20	25
Louisville and Nashville Railroad	756	2	2	.....	20	10
New Orleans and Gulf Railroad	8,976	1	1	.....	6	30
New Orleans and Port Vincent wharf	6,725	*	*	*	*	30
New Orleans and Grand Isle Railroad	875	*	*	*	*	10
East Louisiana Railroad	5,280	1	1	.....	7	25

* Two trips a week.

Also from post-office to steamboat landing, 5,000 feet, more or less, about six trips a week, and about three trips a week from steamboat landing to post-office.

NOTE.—The probable additional service includes the carrying of the mails between the post-office and the New Orleans and Grand Isle Railroad, seven trips a week.

60

ROUTE No. 49101—Continued.

TRANSFER SERVICE AT NEW ORLEANS, LA.

Number of wagon trips required to perform the transfer service.

From—	To—	Distance, station to station.	No. of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
		Feet.					*Mins.*
Morgan's Louisiana and Texas Railroad.	Louisville and Nashville Railroad.	2,000	2	2	.....	14	15
Morgan's Louisiana and Texas Railroad.	Illinois Central Railroad	8,000	1	1	.....	7	30
Morgan's Louisiana and Texas Railroad.	Louisville, New Orleans and Texas Railroad.	6,888	1	1	.....	7	25
Morgan's Louisiana and Texas Railroad.	New Orleans and Northeastern Railroad.	2,103	1	1	.....	7	10
Morgan's Louisiana and Texas Railroad.	Texas and Pacific Railroad	7,926	1	1	.....	7	30
Illinois Central Railroad	Morgan's Louisiana and Texas Railroad.	8,000	1	1	.....	7	30
Louisville and Nashville Railroad.	Morgan's Louisiana and Texas Railroad.	2,000	2	2	.....	14	15
Louisville and Nashville Railroad.	Texas and Pacific Railroad	5,926	1	1	.....	7	30
Louisville and Nashville Railroad.	Louisville, New Orleans and Texas Railroad.	4,888	1	1	.....	7	20
Louisville, New Orleans, and Texas Railroad.	Louisville and Nashville Railroad.	4,888	1	1	.....	7	20

ROUTE No. 49101—Continued.

MAIL STATION SERVICE AT NEW ORLEANS, LA.*

Number of wagon trips required for the performance of service between the post-office and mail stations.

From—	By—	To—	Distance each way.	Trips daily, except Sunday.	Trips on Sunday.	Total number of trips a week.	Running time from July 1, 1890.

* None now required.

Bond required with bid; $10,000; check required with bid, $205.

61 **ROUTE NO. 57362.**

COVERED REGULATION WAGON MAIL-MESSENGER SERVICE AT OMAHA, NEB.

Number of wagon trips required for the performance of the service from railroad stations and steamboat landings to post-office.

Railroad station or steamboat landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Union Pacific Railroad	5,215	12	12	.....	84	20
Burlington and Missouri River Railroad	5,215	6	6	.....	42	20
Chicago, Minneapolis, St. Paul and Omaha Railroad.	2,492	5	5	.....	35	20
Missouri Pacific Railroad	2,492	3	3	.....	21	20

Number of wagon trips required for the performance of the service from post-office to railroad stations and steamboat landings.

Railroad station or steamboat landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Union Pacific Railroad	5,215	11	11	.....	77	15
Burlington and Missouri River Railroad	5,215	6	6	.....	42	15
Chicago, Minneapolis, St. Paul and Omaha Railroad.	2,492	6	6	.....	42	15
Missouri Pacific Railroad	2,492	3	3	.....	21	15

TRANSFER SERVICE AT OMAHA, NEBR.

Number of wagon trips required to perform transfer service.

From—	To—	Distance, station to station.	No. of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
Union Pacific Railroad.....	Chi., Min., St. Paul and Omaha R. R. and Mo. Pacific R. R.	*Feet.* 7,707	5	5	.....	35	*Mins.* 30

62 MAIL-STATION SERVICE AT OMAHA, NEBR. *

Number of wagon trips required for the performance of service between the post-office and mail stations.

From—	By—	To—	Distance each way.	Trips daily, except Sunday.	Trips on Sunday.	Total number of trips a week.	Running time from July 1, 1890.

* None now required.

Bond required with bid, $6,000; check, $150.

ROUTE NO. 76475.

COVERED REGULATION WAGON MAIL-MESSENGER SERVICE AT SAN FRANCISCO, CALIFORNIA.

Number of wagon trips required for the performance of the service from railroad stations or steamboat landings to post-office.

Railroad station or steamboat landing.	Distance.	Running time allowed from July 1, 1900.	Trips. Daily. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	Weekly. Total.
	Rods.	*Mins.*								
Alameda Ferry	175	12	1	3	3	3	3	3	3	19
Oakland Ferry	167	12	9	17	17	17	17	17	17	111
Saucelito Ferry	166	12	.....	3	3	3	3	3	3	18
Tiburon ferry	166	12	1	4	4	4	4	4	4	25
Southern Pacific R. R.	545	30	1	3	3	3	3	3	3	19
Washington St. wharf	166	12	1	.....	1	1	1	1	1	6
Mission St. wharf	185	15	.....	1	1	1	1	1	1	6
Pacific Coast Steamship Co.'s wharf, Eureka mails	160	15	1	.....	.....	1	.....	.....	.....	2
Pacific Coast Steamship Co.'s wharf, B. C. mails	160	15	6 times each month.							
Pacific Mail Steamship Co.'s wharf, Panama mails	424	25	2 times each month.							
Pacific Mail Steamship Co.'s wharf, Japan and China mails	424	25	3 times each month.							
Oceanic Steamship Co.'s wharf, Australian mails	.....	.....	*1 time each month.							
Oceanic Steamship Co.'s wharf, Hawaiian mails	205	25	1 time each month.							
Mission St. wharf, Tahiti mails	185	25	1 time each month.							

* Now performed by Oceanic Steamship Co.

NOTE.—One small and two large wagons are necessary to properly perform the service herein specified.

63

ROUTE No. 76475—Continued.

MAIL MESSENGER SERVICE AT SAN FRANCISCO, CAL.

Number of wagon trips required for the performance of the service from post-office to railroad stations and steamboat landings.

Railroad station or steamboat landing.	Distance.	Running time allowed from July 1, 1890.	Trips. Daily. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	Weekly. Total.
	Rods.	*Mins.*								
Alameda Ferry	175	12	1	3	3	3	3	3	3	19
Oakland Ferry	167	12	12	17	17	17	17	17	17	114
Saucelito Ferry	166	12	1	3	3	3	3	3	3	19
Tiburon Ferry	166	12	1	4	4	4	4	4	4	25
Southern Pacific R. R.	545	30	2	3	3	3	3	3	3	20
Washington St. wharf	166	12	.....	1	1	1	1	1	1	6
Mission St. wharf	185	15	.....	1	1	1	1	1	1	6
Pacific Coast Steamship Co.'s wharf, Eureka mails	160	15	.....	.....	.....	1	.....	.....	1	2
Pacific Coast Steamship Co.'s wharf, B. C. mails	160	15	6 times each month.							
Pacific Mail Steamship Co.'s wharf, Panama mails	424	25	2 times each month.							
Pacific Mail Steamship Co.'s wharf, Japan and China mails	424	25	3 times each month.							
Oceanic Steamship Co.'s wharf, Australian mls.*	.....	.....	.....							
Oceanic Steamship Co.'s wharf, Hawaiian mails	205	25	1 time each month.							
Mission St. wharf, Tahiti mails	185	25	1 time each month.							

* Now performed by Oceanic Steamship Co.

TRANSFER SERVICE AT SAN FRANCISCO, CAL.

Between the termini of different railroad and steamboat routes. From—	To—	Distance.	Running time allowed from July 1, 1890.	Trips. Daily. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	Weekly Total.

This service is not rendered at present, there being no necessity for it.

64 **ROUTE No. 76475—Continued.**

MAIL STATION SERVICE AT SAN FRANCISCO, CAL.

Number of wagon trips required for the performance of the service between post-office and mail stations.

Between main post-office and branch offices, and between branch offices and depots or steamboat landings.		Distance.	Running time allowed.	Trips.							
				Daily.							Weekly.
From—	To and return.			Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	Total.
		Rods.	*Mins.*								
Main P. O.....	Station A.....	470	18	1	5	5	5	5	5	5	31
Do.....	Station B.....	560	20	1	5	5	5	5	5	5	31
Do.....	Station C.....	920	35	1	5	5	5	5	5	5	31
Do.....	Station D.....	170	12	1	7	7	7	7	7	7	43

NOTE.—No. 3 wagons are necessary to perform the service between the main office and stations.

Bond required with bid, $30,000; check, $400.

INSTRUCTIONS TO BIDDERS.

1. The foregoing schedules show the service required September 1, 1889, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term.

2. The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1890, or at any time thereafter during the contract term, whether between post-offices or mail stations and railway or steamboat landings, or between railway stations and mail stations or steamboat landings, or between post-offices and mail stations (including mail stations, railway stations, and steamboat landings),
65 now established or that may hereafter be established, whether caused by changes in stations now established or by the creation of new stations, landings, or offices within said city, or any alteration of route rendered necessary by change in the site of post-offices or depots, or from any other cause. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service, and not by the trip.

3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay.

4. The Postmaster-General may annul a contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a driver or any other person

having charge of the mail when required by the Department; for transmitting commercial intelligence or matter which should go by mail contrary to the stipulations herein, or for transporting persons so engaged; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress, and whenever, in the opinion of the Postmaster-General, the service can not be safely continued or the laws maintained on the route. Fines will be imposed for neglect of duty.

5. The Postmaster-General may, in his discretion, continue in
66 force, beyond its express terms, for a period not exceeding six months, any contract made under this advertisement until a new contract with the same or other contractors shall be made.

6. The distances given are believed to be substantially correct, but no additional pay will be allowed should they be greater than herein stated. Bidders must inform themselves as to the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based on such grounds, or for alleged mistakes or misapprehension as to the service required, or for bridges destroyed or ferries discontinued, can not be considered.

7. Foreign mails in transit across the territory of the United States shall, within the meaning of this advertisement, be deemed and taken to be mails of the United States.

8. The transfer service shall include the conveyance of all cases of post-office supplies arriving for transit through the city.

9. Contractors will be required to convey on the driver's seat of each wagon, whenever necessary, one railway post-office clerk, a substitute, or a messenger.

10. Drivers must be over sixteen years of age, of good moral character, and able to read and write the English language. They must take the oath prescribed by law, and must wear the prescribed cap or hat.

11. All service shall be performed in regulation wagons, unless
67 otherwise mentioned in statement of route. Full particulars as to style and construction of wagons required may be obtained on application to the Second Assistant Postmaster-General, Washington, D. C. Wagons constructed according to the style adopted by the Post-Office Department, of a size about midway between the large two-horse and the large one-horse wagon, preserving the plan of the former, will be permitted, but for these at least two horses shall be used. The wagons shall be kept painted and varnished in a thorough manner and ornamented according to specifications. They must also be frequently washed and kept clean and in good condition. New wagons are not required by the specifications, but only wagons of the prescribed pattern, in first-class condition, and to be as substantially constructed as new wagons. First-class horses shall be used.

12. When mails are delayed in arrival, wagons must be kept at the depots or landings until the arrival of such mails, and the same be conveyed to the post-office without detention. Except in cases of accident, wagons containing mails must not be opened or the mails therein contained changed while in transit. The mails must be carried inside of the wagons, and not on the outside or on the seat with the driver, and

in no case shall any person be allowed to ride inside of the wagon containing mail.

13. The equipment of the contractor shall be subject to monthly inspections, and the refusal or failure of any contractor to keep his wagons, horses, and harness in good order and appearance, or to furnish proper drivers, so as to perform the service in a style creditable to the Department, shall be sufficient cause for the annulment of his contract and the reletting of the service at his expense.

68 14. Specifications for cap and hat: Cap—To be of all-wool blue flannel of good quality, three and one-fourth (3¼) inches high, solid leather fronts one and three-fourths (1¾) inches deep, with one (1) small regulation P. O. D. button on each side, a silver wreathe in front inclosing the words "U. S. Mail," and to have one oiled-linen cover. Hat—From June 16 to September 15 of each year, in lieu of the cap, a straw hat with rim not to exceed three and one-half (3½) inches in width and a crown not to exceed four (4) inches in height may be worn. A silver wreath inclosing the words "U. S. Mail" shall be placed on the front of the hat.

15. The wagons, horses, harness, and drivers are to be at all times subject to the approval and control of the postmaster; and the mails are to be taken from and delivered into the post-offices, mail stations, steamboats, and cars at such points and at such hours, under his direction, approved by the Postmaster-General, as will secure proper dispatches and connections, and at the contractor's expense for tolls and ferriage.

16. The number of wagons required must be sufficient, in the opinion of the postmaster, for the prompt and proper performance of the service.

17. The contractor will be required to provide and keep on hand a sufficient number of extra wagons to take the place of those which may be temporarily disabled, delayed, waiting for trains, or withdrawn from service for repairs, or required by the increase of service, so that the service shall always be promptly performed in regulation wagons.

69 18. Every proposal must be accompanied by a bond, with two or more sureties, approved by a postmaster, and in cases where the amount of the bond exceeds five thousand dollars ($5,000) by a postmaster of the first, second, or third class. Bids for service, the pay of which at the time of the advertisement exceeds five thousand dollars ($5,000), must be accompanied by a certified check or draft, payable to the order of the Postmaster-General, on some solvent national bank, of not less than 5 per centum on the amount of the annual pay on such route, and in case of new or modified service not less than 5 per centum of the amount of the bond accompanying the bid if the amount of said bond exceeds five thousand dollars ($5,000).

19. Sureties on the bond of a bidder must take an oath before an officer qualified to administer oaths that they are the owners of real estate worth, in the aggregate, a sum double the amount of said bond over and above all debts due and owing by them and all judgments, mortgages, and executions against them, after allowing all exemptions of every character whatever. A married woman will not be accepted as a surety either on the bond of a bidder or upon a contract. Accompanying the bond of a bidder, and as a part thereof, shall be a statement of the sureties, under oath, showing the amount of real estate owned by them, brief

descriptions thereof and its probable value, where it is situated, and in what county and State the record evidence of their titles exists. Any surety who swears falsely to this statement is deemed by the law guilty of perjury, and is punishable as is prescribed by law for that crime.

70 20. All checks deposited with bids will be held until contracts are executed and the service commenced, to the satisfaction of the Postmaster-General, by the accepted bidder. Checks indorsed payable to their order will then be returned by mail to the bidders at the addresses stated in their proposals, unless otherwise requested by bidders.

21. There should be but one route bid for in a proposal. Consolidation or combination bids ("proposing one sum for two or more routes") can not be considered.

22. Bidders are cautioned to forward their proposals in time to reach the Department, or to file them, by the day and hour named in this advertisement, as bids received after that time will not be considered. If sent by mail or express, ample time should be allowed for their transit, as they can not be deemed to be received at the Department until actually delivered at the contract office; neither can bids be considered which are without the bond, oath, or certificate required by section 245, act of June 23, 1874, and section 246, act of August 11, 1876. No withdrawal of a bid will be allowed unless the withdrawal is received twenty-four hours previous to the time fixed for opening the proposals.

23. No bidder for carrying the mail shall be released from his obligation under his bid or proposal, notwithstanding an award made to a lower bidder, until a contract for the designated service shall have been duly executed by such lower bidder and his sureties and accepted, the service entered upon by the contractor to the satisfaction of the Postmaster-General.

71 24. No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract.

25. In case of failure of the accepted bidder to execute a contract within the prescribed time, or of the abandonment of service during the contract term, the service will be relet at the expense of the failing bidder or contractor, and any accepted bidder who shall wrongfully refuse or fail to enter into contract in due form, and to perform the service described in his proposal, may be deemed guilty of a misdemeanor, and on conviction thereof be fined and imprisoned therefor.

26. The Postmaster-General reserves the right to suspend the award of contract on any route for a period not exceeding thirty days after the date fixed in this advertisement, with a corresponding allowance of time for the execution of contract, and to reject all bids on any route whenever in his judgment the interests of the service require it; and also to disregard the bids of failing contractors and bidders.

27. Postmasters are cautioned, under penalty of removal, not to approve the bond of any bidder before the proposal is completed and the bond is signed by the bidder and his sureties, and not until entirely satisfied of the sufficiency of the sureties. They are also cautioned not

to divulge to any one the amount of any proposal certified
72 by them. Doing so will be sufficient cause for their removal.

28. No postmaster, assistant postmaster, or clerk employed in any post-office shall be a contractor, or concerned in a contract for carrying the mail.

29. Bidders are requested to use the printed forms of proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised, and to apply at that office for information in regard to the service and its requirements.

30. Proposals should be sealed, superscribed "Proposals for covered regulation wagon mail messenger transfer, and mail station service, city of ," and addressed to the Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.

JOHN WANAMAKER,
Postmaster-General.

PROPOSAL.

Proposals altered by erasures or interlineations of the route, the service, the yearly pay, or the name of the bidder will not be considered.

Proposal opened December 18, 1889.

The undersigned C. C. McCoy, whose post-office address is Walla Walla, county of Walla Walla, Territory of Washington, proposes to carry the mails of the United States, subject to all the requirements contained in the advertisement of the Postmaster-General, dated September 16, 1889, being the advertisement inviting proposals for the covered
73 regulation wagon mail messenger, transfer, and mail station service, from July 1, 1890, to June 30, 1894, on route No. 76,475, between the post-office at San Francisco, California, the railroad stations, mail stations, and steamboat landings, and also between the several railroad stations and steamboat landings and mail stations, under the advertisement of the Postmaster-General dated September 15, 1888, in the covered regulation wagons prescribed by the Department, for the sum of seven thousand seven hundred dollars ($7,700.00) per annum; and if this proposal is accepted I will enter into contract, with sureties to be approved by the Postmaster-General, within thirty days from the date of acceptance.

This proposal is made after due inquiry into, and with full knowledge of, all particulars in reference to the service; and also after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby.

Dated November 9, 1889.

C. C. McCOY, *Bidder.*
, *Bidder.*

Oath required by section 245 of an act of Congress approved June 23, 1874, to be affixed to each bid for carrying the mail, and to be taken before an officer qualified to administer oaths.

I, C. C. McCoy, of Walla Walla, bidder for carrying the mail on the covered regulation wagon mail messenger, transfer, and mail station route No. 76475, between the post-office at San Francisco, California,

and the railroad stations, mail stations, and steamboat landings,
74 and also between the railroad stations, mail stations, and steamboat landings, as above, do swear that I have the ability pecuniarily to fulfill my obligation as such bidder; that the bid is made in good faith, and with the intention to enter into contract and perform the service in case said bid shall be accepted.

C. C. McCoy, *Bidder.*

Sworn to and subscribed to before me, a notary public for the county of Walla Walla, W. T., this ninth day of November, A. D. 1889, and in testimony thereof I hereunto subscribe my name and affix my official seal the day and year aforesaid.

[SEAL.] MARION D. EGBERT,
Notary Public.

NOTE.—When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer.

Bids must be accompanied by a certified check, or draft, on some solvent national bank, payable to the order of the Postmaster-General, when the bond required with bid exceeds $5,000 per annum. The amount of such certified check or draft is stated under the respective routes.

The proposal must be signed by the bidder or each of the bidders and the date of signing affixed.

Direct to the "Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.," marked "Proposal for Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service, city of ."

75 BOND.

Directions: Insert the names of the principal and sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed, and the certificate on the inside should be signed by a justice of the peace, adding his official title, or, if signed by a notary public, he should affix his seal.

Know all men by these presents, that Christopher C. McCoy of Walla Walla, in the Territory of Washington, principal, and David W. Small and William O'Donnell, of Walla Walla, in the Territory of Washington, as sureties, are held and firmly bound unto the United States of America in the just and full sum of thirty thousand ($30,000.00) dollars, lawful money of the United States, to be paid to the said United States of America or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this ninth day of November, 1889.

Whereas by an act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and

seventy-five, and for other purposes," it is provided "that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster," in pursuance whereof and in compliance with the provisions of said law this bond is
76 made and executed, subject to all the terms, conditions, and remedies thereon, in the said act provided and prescribed, to accompany the aforegoing and annexed proposal of said Christopher C. McCoy, bidder.

Now, the condition of the said obligation is such that if the said Christopher C. McCoy, bidder as aforesaid, shall within such time after his bid is accepted as the Postmaster-General has prescribed in said advertisement of Route No. 76475, to wit, within thirty days from the date of acceptance, enter into and file in the Department a contract with the United States of America, with good and sufficient sureties to be approved by the Postmaster-General, to perform the service proposed in his said bid, and further shall perform said service according to his contract then this obligation shall be void; otherwise to be in full force and obligation in law.

In witness whereof we have hereunto set our hands and seals this 9th day of November, 1889.

(Bidder sign here.)

CHRISTOPHER C. McCOY. [SEAL.]

(Sureties sign here.)

DAVID W. SMALL. [SEAL.]
WILLIAM O'DONNELL. [SEAL.]

Witnesses:
A. J. JONES.
M. D. EGBERT.

NOTE.—Any alteration by erasure or interlineation of a material part of the aforegoing bond will cause it to be rejected, unless it appears by a note or memorandum, attested by the witnesses, that the alteration was made before the bond was signed and sealed.

77 When partners are parties to the bond, the partnership name should not be used, but each partner should sign his individual name.

A married woman will not be accepted as surety. Sureties are liable during the whole of contract term.

INTERROGATORIES.

The following interrogatories are prescribed by the Postmaster-General, to be answered, under oath, by each of the sureties in the foregoing bond, and no bid will be considered in which these interrogatories are not fully and satisfactorily answered:

1. What amount in value of real estate is owned by you?
2. Of what description—town or city lots, improved or unimproved, or farming land, cultivated or uncultivated?
3. Where is it situated, county and State?
4. In what county and State does record evidence of your title exist? (Answer fully on next page.)

Especial attention is called to the interrogatories to be answered fully

below. The value, description, location, and place of record of real estate of each surety must be stated as required by the interrogatories; "ditto," "do," or ditto marks can not be accepted for a statement.

OATH OF SURETIES.

TERRITORY OF WASHINGTON,
County of Walla Walla, ss:

On this 9th day of November, 1889, personally appeared before me David W. Small and William O'Donnell, sureties in the foregoing bond, to me known to be the persons named in said bond as sureties, and who have executed the same as such, who, being by me duly sworn, depose and say, and each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein; that he is the owner of real estate worth the sum hereinafter set against his name over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to ($60,000.00) sixty thousand dollars, being double the amount of the aforegoing bond.

78

And in answer to the foregoing interrogatories, each of the said sureties further deposes and says that the value, description, and location of his real estate is as follows:

Names of sureties.	Value of real estate. (Answer to interrogatory No. 1.)	Description of real estate. (Answer to interrogatory No. 2.)	County and State where located. (Answer to interrogatory No. 3.)	County and State where record evidence of title is. (Answer to interrogatory No. 4.)
D. W. Small.....	$30,000	Brick building and city property, improved.	Walla Walla, city and county, W. T.	
Wm. O'Donnell.....	$30,000	Brick building and city property, improved.	Walla Walla, city and county, W. T.	

[Sureties sign here.]

DAVID W. SMALL.
WILLIAM O'DONNELL.

Subscribed and sworn before me this 9th day of November, 1889.

MARION D. EGBERT,
Notary Public.

79

NOTE.—When the above oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

CERTIFICATE OF POSTMASTER.

I, the undersigned, postmaster at Walla Walla, Territory of Washington, after the exercise of due diligence to inform myself of the pecuniary

ability and responsibility of the principal and his sureties in the aforegoing bond, and of the real estate owned by them, respectively, do hereby approve said bond, and certify that, in my belief, the said sureties are sufficient—sufficient to insure the payment of double the entire amount of the said bond; and I do further certify that the said bond was duly signed by Christopher C. McCoy, bidder, and David W. Small and William O'Donnell, his sureties, before signing this certificate.

Dated November 10, 1889.

DANIEL STEWART,
Postmaster.

Postmasters will observe that the improper approval of the bond, or the certificate of the sufficiency of sureties therein, exposes them not only to dismissal, but also to fine or imprisonment. (Sec. 781, Postal Laws and Regulations, 1887.) The approval of the sureties must be by a
80 postmaster, and not by an assistant postmaster or other substitute, either in his own name or in the name of the postmaster.

[Endorsed]: Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service. Route No. 76475. City of San Francisco. (Advertisement of September 15, 1888.) (July 1, 1890, to June 30, 1894.) Proposal of C. C. McCoy. $7,700. Check, $400.

CONTRACTOR'S BOND.

UNITED STATES OF AMERICA,
Walla Walla, Walla Walla County, Washington:

Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service in the city of San Francisco, Cal. No. 76475; $7,700 per annum.

This article of contract, made the seventh day of January, eighteen hundred and ninety, between the United States of America (acting in this behalf by the Postmaster-General) and C. C. McCoy, contractor, and William O'Donnell, Thomas Mosgrove, and D. W. Small, all of Walla Walla, Washington, as his sureties:

Witnesseth, that whereas C. C. McCoy has been accepted as contractor for transporting the mails on route No. 76475, being the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service at the city of San Francisco, Cal., under an advertisement issued by the Postmaster-General on the 16th day of September, 1889, for such service, and which advertisement is herewith referred to and made by
81 such reference a part of this contract, and all new or additional service of said kinds which may at any time during the term of this contract be required in said city, at seven thousand seven hundred dollars per year, for and during the term beginning the 1st day of July, 1890, and ending June 30, 1894.

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First. To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this con-

tract, and within the time fixed in the pamphlet advertisement of the Postmaster-General dated September 16, 1889; and to carry until said schedule is altered by the authority of the Postmaster-General dated September 16, 1889; and so to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet and other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roof; the rear shall open below by gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door hinges or spring hinges, so arranged that it shall shut tight against the gate and lock. The
82 double wagons in all cases, and the single wagons whenever the proper performance of the service requires it, shall have double doors in the side, extending from the paneled frame of the body to the drip of the roof; these doors shall be hung on spring hinges; the locks and hinges to be used on the doors of all wagons shall be of the same make and pattern as is on exhibition on the sample door in the office of the Second Assistant Postmaster-General, at Washington, D. C. On the front shall be a seat for the driver, with footboard, trimmed and finished in leather. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications, and shall be frequently washed and kept clean, and at all times be kept in good order and appearance. The painting, as to colors, ornaments, and design, both on running gear and body, shall conform to the painting and ornamenting shown in the colored drawings on exhibition at the office of the Second Assistant Postmaster-General, at Washington, D. C. The bodies of such wagons shall be made to conform to the lithographic drawings of the side and rear elevations of both single and double wagons hereto appended and made part of this contract, giving scale of dimensions. In case it is desired to increase or decrease the size of said wagons, such increase or decrease shall be made in exact proportion as to height and length, the Postmaster-General reserving the right to vary, at any time, when in his judgment the service may require it, the plan or form of wagon to be used in the service.

Second. To take the mail from, and deliver it into, the post-office, mail
83 stations, and cars at such points and at such hours, under the directions of the postmaster at San Francisco, Cal., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at San Francisco, Cal., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this

behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and, further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 16, 1889.

84 Fifth. To discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster-General so to do; not to transmit by themselves, or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties or employees.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth. To carry post-office blanks, mail locks and mail bags, and all other postal supplies.

Ninth. To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail-station service that the Postmaster-General may order at the city of San Francisco, Cal., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service

85 For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said C. C. McCoy, contractor, is to be paid by the United States the sum of seven thousand seven hundred dollars a year, to wit, quarterly, in the months of November, February, May, and August, through the postmaster at the city of San Francisco, Cal., or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service

thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

And it is further stipulated and agreed that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots and landings, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor
86 shall forfeit, and there may be withheld from his pay, such sum as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed, that the Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service cannot be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a
87 period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster-General.

And it is further stipulated, that no member of, or delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads.

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster-General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractor and his sureties have

hereunto set their hands and seals the day and year set opposite their names respectively.

By order of the Postmaster-General:

S. A. WHITFIELD,
Second Assistant Postmaster-General.

Signed, sealed, and delivered by the Second Assistant Postmaster-General in the presence of J. E. McCabe.

Signed this 3d day of March, 1890.

And by the other parties hereto in the presence of—

JAMES E. SMALL,
Witness as to Contractor.

MARION D. EGBERT,
A. F. MOORE,
Witnesses as to Sureties.

Signed this 10th day of January, 1890.

C. C. McCOY, [SEAL]
Contractor.

88 Signed this 21st day of January, 1890.

W. O'DONNELL, [SEAL]
THOMAS MOSGROVE, [SEAL]
D. W. SMALL, [SEAL]
Sureties.

POST-OFFICE AT WALLA WALLA, WASH.,
January 21st, 1890.

I hereby certify that I am acquainted with William O'Donnell, Thomas Mosgrove, and D. W. Small, all of Walla Walla, Washington, and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

DANIEL STEWART,
Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS AND CARRIERS, REQUIRED BY ACT OF CONGRESS OF MARCH 5, 1874.

(Take this oath after signing the foregoing contract.)

I, C. C. McCoy, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 76475, being covered regulation wagon, mail messenger, transfer and mail station service at San Francisco, Cal., do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which
89 may come into my possession or control. And I also further swear that I will support the Constitution of the United States, so help me God.

C. C. McCOY,
Contractor.

COUNTY OF WASHINGTON,
District of Columbia, ss:

Sworn before the subscriber, M. D. Peck, a notary public for the county and State aforesaid, this 10th day of January, A. D. 1890, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

M. D. PECK. [SEAL.]
Notary Public.

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
CONTRACT DIVISION,
Washington, January 7, 1890.

SIR: The Postmaster-General has accepted your proposal, under the advertisement of September 16, 1889, for carrying the United States mail from July 1, 1890, to June 30, 1894, on California route No. 76475, between the post-office at San Francisco, Cal., and the railroad depots, steamboat landings, and mail stations, at $7,700 per annum, the service to be performed in covered regulation wagons, as prescribed in said advertisement. Contracts will be sent in due time to the postmaster at your place of residence, which you will please execute at once and file
90 in the Department within thirty days from this date; otherwise you will be declared a failing bidder and the service will be relet at your expense.

Very respectfully,
S. A. WHITFIELD,
Second Assistant P. M. General.

Mr. C. C. McCOY,
Walla Walla, Walla Walla Co., Wash.

Date, 1890, March 14th. State of California. No. of route, 76475. San Francisco Reg. Wagon Service. Contractor, C. C. McCoy. Pay, $7,700.

Permit contractor to sublet.

JOHN WANAMAKER,
Postmaster-General.

Date, 1890, April 8th. State of California. No. of route, 76475. San Francisco Covered Regulation Wagon Service. Contractor, C. C. McCoy. Pay, $7,700.

Recognize the subcontract of A. W. Branner, of San Francisco, Cal., at $7,500 per annum, from July 1, 1890, to June 30, 1894.

JOHN WANAMAKER,
Postmaster-General.

Date, 1890, October 28th. State of California. No. of route, 76475. San Francisco, California. Contractor, C. C. McCoy. Pay, $7,700. Subcontractor, A. W. Branner. Pay, $7,500.

91 From November 10, 1890, require contractor to perform additional service as follows: Between main post-office and Station F, 2.60 miles, five round trips daily except Sunday and two round trips Sunday. Between main post-office and Station H, 2.65 miles, five round

trips daily except Sunday and two round trips Sunday. Between main post-office and Station J, .62 miles, five round trips daily except Sunday and two round trips Sunday. Also from December 1, 1890, between main post-office and Station G, 3.12 miles, five round trips daily except Sunday and two round trips Sunday, without additional compensation, being in accordance with terms of his contract.

JOHN WANAMAKER,
Postmaster-General.

Date, 1891, January 3d. State of California. No. of route, 76475. Covered regulation wagon service, San Francisco, Cal. Contractor, C. C. McCoy. Pay, $7,700.

1. Terminate recognition of subcontract of A. W. Branner from November 30, 1890.

2. Recognize the subcontract of N. Wines, of San Francisco, California, at $9,900 per annum, from December 1, 1890, to November 30, 1891.

JOHN WANAMAKER,
Postmaster-General.

92 Date, 1891, February 6th. State of California. No. of route, 76475.

San Francisco, California. Contractor, C. C. McCoy. Pay, $7,700. Subcontractor, N. Wines. Pay, $9,900.

From February 16, 1891, require contractor to perform additional service as follows: Between main post-office and Station E, 1.61 miles, eight round trips daily except Sunday and one round trip on Sunday, without additional compensation, being in accordance with the terms of his contract.

JOHN WANAMAKER,
Postmaster-General.

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700. Subcontractor, N. Wines. Pay, $9,900.

From October 1, 1891, require contractor to supply Substation K on the trips between the main office and Substation B, five (5) times a day except Sunday (or more frequently if necessary), without increase of distance or pay, in accordance with the terms of his contract.

JOHN WANAMAKER,
Postmaster-General.

Date, September 29, 1891.

93 [Telegram.]

SAN FRANCISCO, CAL., *May 3, 1893.*

Hon. J. LOWRIE BELL,
Second Assistant Postmaster-General,
Washington, D. C.:

H. Floyd, of this city, has secured judgment against C. C. McCoy, contractor, route seventy-six four seventy-five, San Francisco regulation wagon service, for $4,300. Outfit will be sold by sheriff, to satisfy judgment, on May 5th. No other regulation wagons are available, and contractor will probably be unable to perform service in present wagons.

Is this a mail-messenger service or a star route? Instruct me what arrangements to make for temporary service, if necessary.

SAMUEL M. BACKUS,
Postmaster.

[Telegram.]

SAN FRANCISCO, CAL., *May 8, 1893.*

SECOND ASSISTANT P. M. GENERAL,
Washington, D. C.:

Service absolutely abandoned this date. Have arranged with Gorman for temporary service in regulation wagons at rate of seventeen thousand five hundred per annum, dating from May 5th. Department has privilege to terminate at any day. Particulars mailed.

BACKUS, *Postmaster.*

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
CONTRACT DIVISION,
Washington, May 9, 1893.

SIR: You are informed that the postmaster at San Francisco,
94 Cal., advises this office that your equipment on route No. 76475, covered regulation wagon service at San Francisco, Cal., was sold on the 5th instant, at sheriff's sale, to J. M. Gorman, and that service in your behalf has been abandoned.

The postmaster has been authorized to employ temporary service, pending the resumption of service by you, at $17,500 per annum.

You are hereby notified that unless you promptly put this service into operation you will be declared a failing contractor, the service will be re-let at your expense, and you and your sureties held subject to the penalties prescribed by law.

Notify this office at once of your intentions relative to this service.

Very respectfully,

J. LOWRIE BELL,
Second Assistant P. M. General.

Mr. C. C. McCOY,
(Care Zevely & Finley,)
Washington, D. C.

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
CONTRACT DIVISION,
Washington, May 17, 1893.

SIR: You are informed that as you have failed to perform service on route 76475, covered regulation wagon service, at San Francisco, Cal., an order has this day been made declaring you a failing contractor.

Very respectfully,

J. LOWRIE BELL,
Second Assistant P. M. General.

Mr. C. C. McCOY,
(Care Zevely & Finley,)
Washington, D. C.

95 [Telegram.]

POST-OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,
Washington, D. C., May 17, 1893.

To W. O'DONNELL, THOS. MOSGROVE, D. W. SMALL,
Walla Walla, Wash.:

C. C. McCoy has failed to perform regulation wagon service in San Francisco in accordance with contract on which you are sureties. Will you assume service? Otherwise service will be relet at expense of contractor and sureties. Telegraph reply.

BELL,
Second Assistant Postmaster-General.

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
CONTRACT DIVISION,
Washington, May 17, 1893.

SIR: Referring to your letter of the 8th instant relative to the employment of temporary service on route 76475, covered regulation wagon service at San Francisco, Cal., you are informed that your action in employing this service is approved and you will continue it until the contractor has resumed service or until you are otherwise ordered by this office.

The Department can not recognize this service from a date prior to May 6, 1893, as there is no way by which it can pay separate parties for part of a day's service.

Very respectfully,

J. LOWRIE BELL,
Second Assistant P. M. General.

POSTMASTER, *San Francisco, Cal.*

96 State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service he is hereby declared a failing contractor.

W. S. BISSELL,
Postmaster-General.

Date, May 18, 1893.

[Telegram.]

PORTLAND, ORE., *May 19, 1893.*

Hon. J. LEWIS BELL,
Second Assistant P. M. General, Washington, D. C.:

Impossible for us to perform McCoy's wagon service at San Francisco, and demand to be released as to future on all McCoy's bonds on which my name appears as surety. My name improperly secured. Letter by mail.

W. O'DONNELL.

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Failing contractor, C. C. McCoy. Pay, $7,700.00.

C. C. McCoy having been declared a failing contractor, and proposals for service for the remainder of the contract term having been invited, it is hereby ordered that the contract for the performance of the service from August 14, 1893, to June 30, 1894, be, and the same is
97 hereby, awarded to Max Popper, of San Francisco, Cal., at the rate of $12,000.00 per annum, being the lowest bid received.

W. S. BISSELL,
Postmaster-General.

Date, June 16, 1893.

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, Max Popper. Pay, $12,000.

Modify order No. 14712, of July 11, 1893, so as to state address of J. M. Gorman at San Francisco, Cal.

F. H. JONES,
Acting Postmaster-General.

Date, July 19, 1893.

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, Max Popper. Pay, $12,000.00.

Pay J. N. Gorman, of San Francisco, Cal., at the rate of $17,500.00 per annum for temporary service from July 1 to August 13, 1893, subject to fines and deductions, and charge to C. C. McCoy, failing contractor.

W. S. BISSELL,
Postmaster-General.

Date, August 29, 1893.

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, Max Popper. Pay, $12,000.00.

Pay J. M. Gorman at the rate of $17,500.00 per annum for
98 temporary service from May 5 to June 30, 1893, subject to fines and deductions, and charge to C. C. McCoy, failing contractor.

F. H. JONES,
Acting Postmaster-General.

Order No. 14712. Date, July 11, 1893.

CONTRACTOR'S BOND.

UNITED STATES OF AMERICA,

San Francisco, San Francisco County, California:

Covered regulation wagon mail messenger, transfer, and mail station service in the city of San Francisco, Cal.

No. 76475. $12,000 per annum.

This article of contract, made the 16th day of June, eighteen hundred and ninety-three, between the United States of America (acting in this

behalf by the Postmaster-General) and Max Popper, contractor, and Henry M. Black, of San Francisco, Cal., and J. L. Franklin, of San Francisco, Cal., as his sureties:

Witnesseth, That whereas Max Popper has been accepted as contractor for transporting the mails on Route No. 76475, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of San Francisco, Cal., under an advertisement issued by the Postmaster-General on the 18th day of May, 1893, for such service, and which advertisement is herewith referred to and made by such reference a part of this contract, and all new or additional service of said kinds which may at any time during the term of this contract be required in
99 said city at twelve thousand dollars per year, for and during the term beginning the 14th day of August, 1893, and ending June 30, 1894.

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First. To carry said mail, using therefore wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster-General dated September 16, 1889; and to carry until said schedule is altered by the authority of the Postmaster-General dated September 16, 1889; and so to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet and other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roof; the rear shall open below by gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door hinges or spring hinges, so arranged that it shall shut tight against the gate and lock. The double wagons in all cases, and the single wagons whenever the proper performance of the service requires it, shall have double doors in the side, extending from the paneled frame of the body to the
100 drip of the roof; these doors shall be hung on spring hinges; the locks and hinges to be used on the doors of all wagons shall be of the same make and pattern as is on exhibition on the sample door in the office of the Second Assistant Postmaster-General at Washington, D. C. On the front shall be a seat for the driver, with footboard, trimmed and finished in leather. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications, and shall be frequently washed and kept clean, and at all times be kept in good order and appearance. The painting, as to colors, ornaments, and design, both on running gear and body, shall conform to the painting and ornamenting shown in the colored drawings on exhibition at the office of the Second Assistant Postmaster-General at Washington, D. C. The bodies of such wagons shall be made to conform to the lithographic drawings of the side and rear elevations of both single and double wagons hereto appended and made part of this contract, giving

scale of dimensions. In case it is desired to increase or decrease the size of said wagons, such increase or decrease shall be made in exact proportion as to height and length, the Postmaster-General reserving the right to vary at any time, when, in his judgment, the service may require it, the plan or form of wagon to be used in the service.

Second. To take the mail from and deliver it into the post-office, mail stations, and cars at such points and at such hours, under the directions of the postmaster at San Francisco, Cal., approved by the Postmaster-General, as will secure dispatches and connections and
101 facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at San Francisco, Cal., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are, or may be, by law imposed upon such person or persons in the care and transportation of said mails; and, further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 16, 1889.

Fifth. To discharge any driver, or other person employed in
102 performing mail service, whenever required by the Postmaster-General so to do; not to transmit by themselves or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties or employees.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth. To carry post-office blanks, mail-locks and mail-bags, and all other postal supplies.

Ninth. To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the

Postmaster-General may order at the city of San Francisco, Cal., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service.

103 For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said Max Popper, contractor, is to be paid by the United States the sum of twelve thousand dollars a year, to wit: Quarterly, in the months of November, February, May, and August, through the postmaster at the city of San Francisco, Cal., or otherwise, at the option of the Postmatter-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

And it is further stipulated and agreed that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots, and landings; or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor

104 shall forfeit, and there may be withheld from his pay such sum as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed that the Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising

under this contract or otherwise, be assessed and liquidated by the auditor of the Treasury for the Post-Office Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a
105 period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster-General.

And it is further stipulated that no member of or delegate to Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads.

In witness whereof, the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster-General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

By order of the Postmaster-General:

J. LOWRIE BELL,
Second Assistant Postmaster-General.

Signed, sealed, and delivered by the Second Assistant Postmaster-General in the presence of J. E. McCabe.

Signed this 22d day of August, 1893.

And by the other parties hereto in the presence of

W. S. BOYCE.
JOHN P. DEVEREUX.

Signed this 22d day of July, 1893.

MAX POPPER, [SEAL.]
Contractor.

106 Signed this 22d day of July, 1893.

HENRY M. BLACK, [SEAL.]
J. L. FRANKLIN, [SEAL.]
Sureties.

POST-OFFICE AT SAN FRANCISCO, CAL., *July 25th, 1893.*

I hereby certify that I am acquainted with Henry M. Black, of San Francisco, Cal., and J. L. Franklin, of San Francisco, Cal., and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

SAMUEL W. BACKUS,
Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS AND CARRIERS, REQUIRED BY ACT OF CONGRESS OF MARCH 5, 1874.

(Take this oath after signing the foregoing contract.)

I, Max Popper, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 76475, being covered regulation wagon mail messenger, transfer and mail-station service at San Francisco, Cal., do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which
107 may may come into my possession or control. And I also further swear that I will support the Constitution of the United States, so help me God.

CITY AND COUNTY OF SAN FRANCISCO,
State of California, ss:

Sworn before the subscriber, postmaster for the city and county and State aforesaid, this 25th day of July, A. D. 1893, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

SAMUEL W. BACKUS. [SEAL.]

BOND.

Directions: Insert the names of the principal and sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed, and the amounts set opposite each name in the jurat.

Know all men by these presents that Max Popper, of San Francisco, in the State of California, principal, and Henry M. Black, of San Francisco, and Julius L. Franklin, of San Francisco, in the State of California, as sureties, are held and firmly bound unto the United States of America in the just and full sum of thirty thousand dollars, lawful money of the United States, to be paid to the said United States of America, or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

108 Sealed with our seals, and dated this twenty-second day of July, 1893.

Whereas C. C. McCoy, contractor on route No. 76475, under advertisement of September 16th, 1889, has failed and refused to perform the service according to his contract, and the Postmaster-General has awarded the contract for the performance of the service on said route No. 76475, for the remaining part of the said term, to the above-named Max Popper, who has consented to enter into contract, and give bond, with sureties to be approved by the Postmaster-General, for the faithful performance thereof; and whereas, also, the said Max Popper, in pursuance of the said award of the Postmaster-General, has executed the aforegoing contract, and now executes this bond in accordance with the

provisions of the act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1875, and for other purposes."

Now, the condition of the above obligation is such that if the above-bounden Max Popper shall justly perform the service as he has contracted to do in the foregoing contract, then this obligation shall be void; but if the said Max Popper shall fail or refuse to perform the service according to his said contract, then and in that case the said bond shall be of full force and obligation in law, and he and his sureties shall be liable for the amount of his said bond as liquidated damages, to be recovered in action of debt on his said bond.

109 In witness whereof, we have hereunto set our hands and seals this 22d day of July, 1893.

MAX POPPER. [SEAL.]
HENRY M. BLACK. [SEAL.]
J. L. FRANKLIN. [SEAL.]

Witness as to Henry M. Black and J. L. Franklin:

S. J. LEVY.

INTERROGATORIES.

The following interrogatories are prescribed by the Postmaster-General, to be answered, under oath, by each of the sureties in the aforegoing bond:

1. What amount in value of real estate is owned by you?

2. Of what description—town or city lots, improved or unimproved, or farming land, cultivated or uncultivated?

3. Where is it situated, and in what county and State does record evidence of your title exist? (Answer fully on this page.)

OATH OF SURETIES.

STATE OF CALIFORNIA,
County of San Francisco, ss.:

On this twenty-second day of July, 1893, personally appeared before me Henry M. Black and J. L. Franklin, sureties in the aforegoing bond, to me known to be the persons named in said bond as sureties, and who have executed the same as such, who being by me duly sworn, depose and say, each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein;

110 that he is the owner of real estate worth the sum hereinafter set against his name over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to ($60,000) sixty thousand dollars, being double the amount of the foregoing bond.

And in answer to the aforegoing interrogatories, each of the said sureties further deposes and says that the value, description, and location of his real estate is as follows:

Names of sureties.	Value of real estate (as required by interrogatory No. 1).	Description of real estate (as required by interrogatory No. 2).	Where located, recorded, evidence of title (as required by interrogatory No. 3).
Henry M. Black ...	$20,000	Lot and improvements, 95 x 117, bet. Fulton and McAllister sts.	City of San Francisco, San Francisco County, Cal.
	12,000	SW. cor. Pye and Broderick sts., lot and improvements.	City of San Francisco, San Francisco County, Cal.
J. L. Franklin.....	15,000	House and lot, 1328 Hayes st., bet. Devisadero and Broderick sts., 25 x 137.6.	City of San Francisco, San Francisco County, Cal.
	35,000	Lot and improvements, W. S Fillmore, bet. Sutter and Bush sts., 50 x 00. No incumbrance on either of above.	City of San Francisco, San Francisco County, Cal.

HENRY M. BLACK.
J. L. FRANKLIN.

Subscribed and sworn before me this twenty-second day of July, 1893.

[SEAL.] SOL. J. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF POSTMASTER.

I, the undersigned, postmaster at San Francisco, State of California, after the exercise of due diligence to inform myself of the pecuniary ability and responsibility of the principal and his sureties in
111 the foregoing bond, and of the value of the real estate owned by them, respectively, over and above all liens and encumbrances, do hereby approve said bond, and certify that the said sureties are sufficient to insure the payment of double the entire amount of said bond; and I do further certify that the said bond was duly signed by Max Popper and Henry M. Black and J. L. Franklin, his sureties, before signing this certificate.

SAMUEL W. BACKUS,
Postmaster.

Dated July 25th, 1893.

State of California. Route No. 76475. Year 1893. July 1st to August 14th.

Mail messenger service, San Francisco. Contractor, C. C. McCoy. Pay, $7,700. July 5, 1893, eleven pouches for S. F. & S. C. R. P. O. were returned to P. O. instead of dispatched; delay, sixteen hours.

Fine, $5.00.

W. S. BISSELL,
Postmaster-General.

Date of case, August 30, 1893.

(Endorsed:) 137 C. C. Plf's Ex. "A." November 14, 1899. No. 599. U. S. circuit court of appeals for the ninth circuit. Plaintiff's Exhibit A. Received March 26, 1900. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

112 Defendants object to the certificate to account for the amount of actual damages, as follows:

Defendants object to the first item stated in said account, to wit, the amount paid J. M. Gorman for temporary services from May 5th to August 13th, 1893, $4,827.77, for the reason that the same is not competent or material, and for the further reason that it does not appear that said assessment of damages shown by said item is properly made up.

Defendants object to the third item shown in said account, for the reason that the same is not competent or material, and it appears that the damages shown by said item are improperly assessed.

Defendants are willing to admit so much of said account as is shown in the second item, to wit, the amount of fine, third quarter, 1893, $5.00, as competent evidence against the defendants in this cause.

Defendants object to the admission of the copy from the Treasury Department headed "Certificate to evidence of demand," for the reason that the same is not competent, material, or relevant.

Defendants object to the admission of the copy of the telegram dated May 3d, 1893, and the copy of telegram dated May 8th, 1893, for the reason that the same, and each of them, are incompetent and immaterial, and it appears that neither of the same is the best evidence of the contents thereof, the same purporting to be copies of copies, and not the originals in the office of the treasurer for the Post-Office Department.

113 Defendants object to the admission of the copy of the letter to C. C. McCoy, dated May 9th, 1893, for the reason that the same is not competent or material, and for the further reason that it has not been proved that said letter was delivered to C. C. McCoy or directed to the address of C. C. McCoy.

Defendants object to the admission of the letter to C. C. McCoy, dated May 17th, 1893, for the reason stated above, in last objection.

Defendants object to the admission of the telegram to William O'Donnell, Thomas Mosgrove, D. W. Small, dated May 17th, 1893, for the reason that the same is not competent or material.

Defendants object to the admission of the copy of telegram dated May 19th, 1893, signed William O'Donnell, for the reason that the same is not competent or material to prove any liability against these defendants, and it appears that said copy is not a copy of any original paper in the office of the Auditor for the Post-Office Department.

Defendants object to the admission of the letter dated August 29th, 1893, signed W. S. Bissell, Postmaster-General, for the reason that the same is not competent or material to prove any liability on the part of any of the defendants herein.

It having been stipulated in open court between counsel that the copies contained in said transcript of the advertisement of September 16th, 1889, and the proposal and bond purporting to be signed by C. C. McCoy, David W. Small, and William O'Donnell, and the contract and bond signed by C. C. McCoy, D. W. Small, William O'Donnell, and Thomas Mosgrove, and the contract and bond signed by Max

114 Popper, Henry W. Black and J. L. Franklin, were true copies of the originals of such instruments, and the said proposal and bond signed by C. C. McCoy, David W. Small and William O'Donnell, and the said contract and bond signed by C. C. McCoy, David W. Small,

William O'Donnell and Thomas Mosgrove, were signed and executed by these defendants; and said copies were admitted in evidence without objection.

The plaintiff then rested its case. The defendants announcing that they had no evidence to introduce, plaintiff requested of the court the following instruction:

"Gentlemen of the jury, the plaintiff having made out a prima facie case herein by competent evidence, showing the defendants to be indebted to the plaintiff in the sum of $5,772.99 and interest thereon at the rate of six per cent per annum from the 1st day of March, 1895, and the defendants not having introduced any evidence whatever to answer or explain the case made out and evidence introduced by the plaintiff, the court instructs you to return a verdict in favor of the plaintiff and against the defendants, and each of them, for the sum of $5,772.99 and interest thereon at the rate of six per cent per annum from the 1st day of March, 1895."

Which said instruction the court then and there refused to give, and in refusing to give the same, endorsed thereon the following:

"Refused exception allowed."

To which refusal of the court to give said instruction the plaintiff duly excepted and its exception was allowed.

Whereupon the court, at the re uest of the defendants, instructed the jury as follows:

115 "Gentlemen of the jury, it will not be necessary for you to retire to consider this case. You can render a verdict from your seats. This is an action in which the Government sued to recover damages for breach of a mail contractor's bond—breach of the contract. The action is against the contractor and the sureties upon his bond. The Government claims damages for the total abandonment of the contract without having performed it, and as to that claim all the evidence that has been offered on the part of the Government is insufficient to prove that there was an abandonment, there being no testimony of any witness having knowledge of the fact that the contractor did fail. The evidence includes the statement of account made up by the auditing department of the Government, in which there appears to have been a fine of five dollars imposed upon the contractor for a particular failure, and in accordance with the decision of the circuit court of appeals for this circuit, that evidence is sufficient prima facie to entitle the Government to recover the five dollars, and the defendants here in open court have admitted liability for that five dollars. Therefore your verdict will be in favor of the Government for the sum of five dollars. I have prepared a verdict which you will select one of your number to sign as foreman, and that will be your verdict in the case."

To which instruction as given by the court the plaintiff, by Edward E. Cushman, assistant United States attorney, took its exception as follows:

116 "Comes now the plaintiff, before the rendition of said verdict, and excepts to the instruction of the court to the jury to return such verdict, and excepts to the ruling of the court in its instruction to the jury that the plaintiff had failed to take out a prima facie case, and that it was necessary for the plaintiff, in order to make out a prima facie case, to show other than had been shown by the evidence

offered by it, the abandonment and failure on the part of the defendant, C. C. McCoy, to carry and deliver the mails in the city of San Francisco, as he had agreed to do."

Which said exception as taken by the plaintiff was duly allowed.

I, C. H. Hanford, judge of the above-entitled court, and the judge who tried the above-entitled action, do hereby certify that the matters and proceedings embodied in the foregoing bill of exceptions, consisting of 68 pages, are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record therein. I further certify that same contains all of the material facts, matters, and proceedings heretofore occurring in the cause and not already a part of the record therein.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the United States circuit court, district of Washington, May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

117 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Praecipe for transcript.

To the clerk of the above-entitled court:

You will please include in the record in the above-entitled cause, to be prepared, certified, and sent to the court of appeals, of the records and files therein, the following:

Amended complaint; answer; trial record, first trial; order for entry of judgment, first trial; order granting motion for nonsuit, first trial; assignment of error on first appeal; writ of error on first appeal; mandate; opinion of court of appeals; trial record, last trial; motion for new trial; order denying motion for new trial; judgment and exceptions thereto; petition for writ of error; assignments of error; order allowing writ of error; writ of error; citation; bill of exceptions and statement of facts.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

(Endorsed:) Filed in the United States circuit court, district of Washington. May 25th, 1901. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

118 In the circuit court of the United States for the district of Washington, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'Donnell, and Thomas Mosgrove, defendants. } No. 137.

UNITED STATES OF AMERICA,
District of Washington, ss:

Clerk's certificate to transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the foregoing one hundred and four (104) pages, numbered from one (1) to one hundred and four (104), inclusive, to be a full, true, and correct copy of the record and proceedings had in the above-entitled cause, as the same remains on file and of record in the office of the clerk of the circuit court of the United States for the district of Washington, at Walla Walla, Washington, in the southern division of said district, and that the foregoing pages constitute the transcript of the record on appeal in the above-entitled cause from the circuit court of the United States for the district of Washington, southern division, to the United States circuit court of appeals for the ninth judicial circuit, and the return to the annexed writ of error filed in my office on the 11th day of May, 1901.

119 I further certify that I hereto annex and herewith transmit the original citation issued in said cause and the original writ of error issued in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal and return to writ of error is the sum of $36.70, and that the same is chargeable to the United States and will be included in my account for clerk's fees against the United States for the quarter ending June 30th, 1901.

In witness whereof I have hereunto set my hand and the seal of said circuit court this 3d day of June, 1901.

[SEAL.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
For the District of Washington.
By H. B. STRONG, *Deputy Clerk.*

[Ten-cent U. S. int. rev. stamp canceled.]

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Washington, ninth judicial circuit, greeting:

120 Because in the record and proceedings, as also in the rendition of the judgment and order denying motion for a new trial in the above-entitled cause and action, which is in the said circuit court before you or some of you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given and said order therein made, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ that you have the same at the city of San Francisco, in the State of California, within thirty days from the 10th day of May, 1901, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] A. REEVES AYRES,
Clerk of the Circuit Court of the United States
For the District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

121 This writ hereby allowed this 11th day of May, 1901.

C. H. HANFORD,
U. S. District Judge, presiding in said circuit court.

Due and full service of the foregoing writ of error acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Defendants.

(Endorsed:) No. 137. In the circuit court of the United States for the district of Washington. United States vs. C. C. McCoy et al. Writ of error. Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
C. C. McCOY ET AL., DEFENDANTS. } No. 137.

Citation.

The President of the United States, greeting, to C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove:

You are hereby cited and admonished to be and appear at a session
122 of the United States circuit court of appeals for the ninth circuit to be holden at the city of San Francisco, in said circuit, within thirty days from the 10th day of May, 1901, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, southern division, wherein the United States of America is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered in favor of the plaintiff in error for the sum of five dollars and costs on the 11th day of May, 1901, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States of America the one hundred and twenty-fifth.

[SEAL.]

C. H. HANFORD,
United States District Judge, presiding in said circuit court.

Due and full service of the above citation in behalf of appellees and defendants acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Appellees and Defendants.

(Endorsed:) No. 137. In the circuit court of the United States for the district of Washington. United States vs. C. C. McCoy et al. Citation. Filed May 11, 1901. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

123 (Endorsed:) No. 708. In the United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants in error. Transcript of record. Upon writ of error to the circuit court of the United States for the district of Washington, southern division.

Filed June 10, 1901.

F. D. MONCKTON, *Clerk.*

123½ *Proceedings in the United States circuit court of appeals for the ninth circuit.*

124 At a stated term, to wit, the October term, A. D. 1901, of the United States circuit court of appeals for the ninth circuit, held

at the court room in the city and county of San Francisco, on Friday, the eleventh day of October, in the year of Lord one thousand nine hundred and one.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
C. C. McCOY ET AL., DEFENDANTS IN ERROR. } No. 708.

Order of submission.

Ordered cause argued by Edward E. Cushman, esquire, assistant United States attorney, no one appearing for the defendants in error, and submitted to the court for consideration and decision, with leave to the United States to file a reply brief within 20 days.

125 In the United States circuit court of appeals for the ninth circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE, defendants in error. } No. 708.

In error to the circuit court of the United States for the district of Washington, southern division.

Wilson R. Gay, U. S. attorney; Edward E. Cushman, assistant U. S. attorney.

W. T. Dovell, attorney for defendants in error.

Opinion.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge: This case has been before this court before, and was returned to the lower court with directions to take further proceedings therein. (United States v. McCoy et al., 104 Fed., 669.) There is nothing in the present record showing any error in the subsequent proceedings taken in pursuance of such directions. The judgment of the circuit court is therefore affirmed.

(Endorsed:) Opinion. Filed March 3, 1902. F. D. Monckton, clerk.

126 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'Donnell, and Thomas Mosgrove, defendants in error. } No. 708.

Judgment.

In error to the circuit court of the United States for the district of Washington, southern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, southern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed and entered Mar. 3, 1902. F. D. Monckton, clerk.

127 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF and plaintiff in error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'Donnell, and Thomas Mosgrove, defendants and defendants in error. } No. .

Petition for writ of error.

Comes now the United States of America, plaintiff and plaintiff in error, by P. C Knox, Attorney-General of the United States, and says that on the 7th day of April, 1902, there was made and entered in the United States circuit court of appeals for the ninth circuit, wherein this cause and action was then pending, a certain order, mandate, and judgment, wherein and whereby it was adjudged and determined that the judgment of the circuit court of the United States for the district of Washington, southern division, from which latter-named court this cause and action had been brought by writ of error to said circuit court of appeals, was affirmed, in which said order, judgment, and mandate of said court certain errors were committed, to the prejudice of the plaintiff and plaintiff in error. Plaintiff in error further states that in said cause and action in said circuit court of appeals there was on the 27th day of April, 1901, a certain other order, judgment, and mandate made and entered, wherein and whereby a certain other order and judgment of said circuit court for the district of Washington was in part affirmed and in part reversed, in which said judgments, orders, and mandates certain errors were both by said circuit court of appeals and by said circuit court committed to the prejudice of this plaintiff in error; all of which said errors

will more in detail appear from the assignment of errors which is filed with this petition.

128 Plaintiff in error further states that the amount sued for in this cause and action in the circuit court for the district of Washington, southern division, and the amount involved herein, exclusive of costs and interest, is $5,772.99.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf from the above-entitled court to the United States circuit court of appeals for the ninth circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

P. C. KNOX,
Attorney-General.

(Endorsed:) Petition for writ of error. Filed October 3rd, 1902. F. D. Monckton, clerk.

129 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF AND plaintiff in error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'Donnell, and Thomas Mosgrove, defendants and defendants in error. } No. .

Assignments of error.

Comes now the plaintiff in this cause, by P. C. Knox, Attorney-General, and in connection with its petition for writ of error makes the following assignment of errors which, it is averred, occurred on the judgment and hearing of this cause and prior thereto:

I.

That the circuit court of appeals for the ninth circuit, in its judgment and mandate made and entered on the 7th day of April, 1902, and in its opinion rendered and filed therewith, erred in affirming the judgment of the circuit court for the district of Washington, then pending before it and said circuit court of appeals upon writ of error from said circuit court.

II.

That said circuit court of appeals further erred in adjudging and deciding that the said circuit court had not committed any error in its judgment of the 11th day of May, 1901, referred to in said judgment and mandate.

III.

That the said circuit court of appeals in said judgment and mandate and the opinion rendered and filed therewith further erred in deciding

that said circuit court had not committed any error in the proceedings subsequent to the hearing and determination of said cause in the circuit court of appeals, culminating in an interlocutory judgment therein made and filed on the 27th day of April, 1901, and hereinafter more fully mentioned.

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IV.

That the said circuit court of appeals for the ninth circuit, in its mandate and judgment, together with its opinion rendered and filed therewith, further erred in deciding that the said circuit court had not erred in refusing plaintiff a continuance on the motion and showing made at the time set for trial of said cause in said circuit court on the 9th day of May, 1901.

V.

That the said circuit court of appeals, in its said mandate and judgment made on the 7th day of April, 1902, and in its mandate and judgment made and entered on the 27th day of April, 1901, and in the decisions and opinions rendered and filed therewith, further erred in deciding and adjudging that the said circuit court in the judgments therein referred to had not erred in making the judgments of nonsuit against the plaintiff on the ground that the plaintiff had failed to make out a prima facie case by its evidence introduced on account of the actual damage claimed and sued for.

VI.

That the said circuit court of appeals, in its said mandate and judgment made on the 7th day of April, 1902, and in its mandate and judgment made and entered on the 11th day of October, 1901, and in its decisions and opinions rendered and filed therewith, further erred in deciding and adjudging that plaintiff's evidence offered at the trial in the circuit court on the 15th day of November, 1899, and on the 9th day of May, 1901, was legally insufficient to make out a prima facie case and prove the abandonment by the defendant in error, C. C. McCoy, and his subcontractors, of the contract, and his and their failure and refusal to perform the same, for the breach of which said action was brought, and in deciding and determining that said evidence was not sufficient to require a judgment in plaintiff's favor in the absence of any rebutting evidence.

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VII.

That the said circuit court of appeals, in its mandate and judgment made on the 7th day of April, 1902, and in its mandate and judgment made and entered on the 11th day of October, 1901, and in its decisions and opinions rendered and filed therewith, further erred in deciding and determining that the settlement of McCoy's account by the auditor of the Post-Office Department, the telegram of the postmaster at San Francisco to the Second Assistant Postmaster-General dated May 8, 1893, stating that the contract had been abandoned, the letter of the Second Assistant Postmaster-General dated May 17, 1893, and addressed to the

postmaster at San Francisco, approving the action of the latter in employing temporary service for the route, the certificate of the Postmaster-General dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, referred to in said court's opinion, were legally insufficient to establish the fact that McCoy had abandoned the performance of his contract, the damages arising from the breach of which were sued for in said action.

VIII.

That the said circuit court of appeals, in its said mandate and judgment made on the 7th day of April, 1902, and in its mandate and judgment made and entered on the 27th day of April, 1901, further erred in commanding and directing the said circuit court for the district of Washington to take further proceedings in said cause in accordance with the opinion and judgment of the said circuit court of appeals herein alluded and excepted to.

Wherefore, plaintiff in error prays a reversal of each of said orders, judgments, and mandates, and that a mandate and order issue from this court, directed to the circuit court for the district of Washington, commanding and directing said court to set aside its orders and judg-
132 ments of non-suit herein, and further ordering and directing said court to enter judgment in favor of plaintiff for the sum of $5,772.99 with interest and costs.

P. C. KNOX,
Attorney-General.

(Endorsed:) Assignments of error. Filed October 3rd, 1902. F. D. Monckton, clerk.

133 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE, defendants in error. } No. 708.

Certificate of clerk U. S. C. C. A. to transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and thirty-two (132) pages, numbered from one (1) to one hundred and thirty-two (132), inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above-entitled case, as the same appear of record in my office, and that the same, together, constitute the transcript of record herein upon return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit at San Francisco, California, this 3rd day of October, A. D. 1902.

[SEAL.] F. D. MONCKTON, *Clerk.*

134 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of appeals for the ninth circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you, or some of you, between the United States of America is plaintiff in error, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove are defendants in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of August, in the year of our Lord one thousand nine hundred and two.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

135 *Return to writ of error.*

The answer of the judges of the United States circuit court of appeals for the ninth circuit:

As within we are commanded, we certify under the seal of our circuit court of appeals in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendants in error.

By the Court:

[SEAL.] F. D. MONCKTON, *Clerk.*

Indorsed: No. 708. United States circuit court of appeals for the ninth circuit. The United States of America *vs.* C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove. Original. Writ of error. Filed Oct. 3, 1902. F. D. Monckton, clerk.

136 UNITED STATES OF AMERICA, *ss:*

To C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date

hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of appeals for the ninth circuit, wherein the United States of America, plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 19th day of August, in the year of our Lord one thousand nine hundred and two.

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

Due and personal service of the hereto attached citation is hereby admitted and accepted and copy thereof received this 29th day of August, A. D. 1902, at the city of Walla Walla, county of Walla Walla, State of Washington.

W. T. DOVELL,
Attorney for each and all of the Defendants.
WM. O'DONNELL,
Defendant.

_____ _____,
Defendant.

_____ _____,
Defendant.

137 *Return on service of writ.*

UNITED STATES OF AMERICA,
Nor. District of Washington, ss:

I hereby certify and return that I served the annexed on the therein-named Thos. Mosgrove personally at Seattle, King County, State of Washington, on the 26 day of August, 1902.

C. B. HOPKINS,
U. S. Marshal,
By JOHN STRINGER,
Deputy.

138 (Indorsed:) No. 708. United States circuit court of appeals for the ninth circuit. United States of America *vs.* C. C. McCoy et al. Original citation on writ of error. Filed Oct. 3, 1902. F. D. Monckton, clerk.

(Indorsement on cover:) File No. 18708. U. S. C. C. of appeals, 9th circuit. Term No. 480. The United States, plaintiff in error, *vs.* C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove. Filed October 22, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE. } No. 148.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was instituted by the United States against C. C. McCoy, as principal, and David W. Small, William O'Donnell, and Thomas Mosgrove, as bondsmen, to recover the sum of $5,772.99, and interest, alleged to be the amount of actual damages sustained by the United States by reason of the failure of McCoy to perform a contract made and entered into by him with the United States for the transportation of the United States mail on route No. 76475 in the city of San Francisco.

The facts in this case are substantially as follows: In the month of January, 1890, the defendant in error, C. C. McCoy, and his codefendants as sureties on his

bond, entered into a contract with the United States for the transportation of mail in the city of San Francisco, Cal. Under this contract McCoy was to furnish certain equipment for carrying the mails and to perform certain service described in the advertisement of the Postmaster-General of September 16, 1889, inviting proposals for such service, and to perform all new or additional service of the same character which might at any time during the term of said contract be required in said city, for the sum of $7,700 per year. The term of the contract extended from July 1, 1890, to June 30, 1894, a period of four years. McCoy proceeded with his undertaking, being permitted by the Postmaster-General to sublet the said contract on two different occasions, first, to A. W. Branner, for the sum of $7,500 per annum, and second, on the 1st day of December, 1890, to N. Wines, for the sum of $9,900 per annum. From November 10, 1890, the Postmaster-General required the contractor to perform additional service without additional compensation, in accordance with the terms of the contract. From February 16, 1891, a further service was required; and from October 1, 1891, still further service. It is alleged that on the 8th day of May, 1893, the said McCoy and the said subcontractors abandoned the said contract, and failed and refused to perform the same; that on the following day said McCoy was notified by the Post-Office Department that unless he should promptly put the service into operation he would be declared a failing contractor; that the service would be relet at his expense, and that his sureties would be held subject to

the penalties of law; also, that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of service of the said contractor, at the rate of $17,500 per annum; and on May 17, 1893, said McCoy having failed to perform the service on route No. 76475, an order was made by the Second Assistant Postmaster-General declaring the said C. C. McCoy a failing contractor. It is further alleged that, by reason of this failure of the said McCoy to carry the mails as agreed, the Government was compelled to procure temporary service from May 5 to August 13, 1893, for which service the amount of $4,827.77 was paid; that in addition to this amount the said McCoy was fined $5 for failure to perform the agreed service during the third quarter of the year 1893. A contract was awarded to one Max Popper, of San Francisco, for the performance of the service during the remainder of the term, namely, from August 14, 1893, to June 30, 1894, at the rate of $12,000 per annum, this being the lowest bid obtainable; and in accordance therewith the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do. The difference between the amount of the contract to McCoy and that to Popper for the specified time is $3,785.87, which is claimed to be chargeable to the defendants in error. As an offset to the claims, credit is given for the amount the said McCoy would have been entitled to receive had he complied with his contract to the end of the term—to wit, $2,845.65—leaving a remainder of $5,772.99, the actual damage claimed

by the plaintiff by reason of the failure of McCoy to perform said contract. The defendants entered a general denial to the allegations of the complaint. Upon the trial of the case the Government introduced in evidence certain documents, as follows: (1) A certified copy from the records in the Auditor's office of the Post-Office Department of the account of C. C. McCoy, as failing contractor, for amount of actual damage to the United States; (2) certified copy of postmaster at Walla Walla, Wash., to the Auditor, that said postmaster had made demand on C. C. McCoy and upon two of his sureties for payment of $30,000; (3) a certified copy of account for amount of bond of C. C. McCoy, failing contractor; copy of proposals and advertisements to bidders for mail transportation service; (4) copy of contract and bond entered into by the defendants in error with relation to the transportation of mails on route No. 76475; (5) recognitions by the Postmaster-General of subcontracts for the service under this contract; (6) requirements of Postmaster-General for additional service by contractor; (7) two telegrams from the postmaster at San Francisco to Department at Washington, D. C., regarding abandonment of service by McCoy; (8) communications to the defendants from Post-Office Department regarding failing contract; (9) orders of Postmaster-General declaring McCoy a failing contractor and recognizing contracts for temporary service with J. N. Gorman, and for service for balance of term with Max Popper; (10) contract and bond of Max Popper for this service

to completion of term. No other evidence was offered on behalf of the Government, and its case rested entirely upon such documentary evidence.

Upon the first trial before the circuit court of the United States for the district of Washington, southern division, the court ordered judgment in favor of the defendants in error, "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case." (Record, p. 10.) The Government took the case, on writ of error, to the circuit court of appeals for the ninth circuit, and that court reversed the judgment of the court below, holding that under the evidence submitted the Government was entitled to a verdict and judgment for the sum of $5, being the amount of a fine imposed by the Postmaster-General upon the contractor for a delay of sixteen hours on July 5, 1893, in dispatching 11 pouches of mail for the S. F. & S. C. R. P. O. (Record, p. 15, 16; 104, Fed., 669.)

The case was remanded and again tried before the circuit court of the United States for the district of Washington on the 9th day of May, 1901, and the Government introduced upon that trial identically the same documentary evidence which it offered upon the first trial of the case, a motion for a continuance by the Government on account of the absence of a material witness, to wit, the postmaster at San Francisco, having been denied by the court. The defendants offered no evidence. The court thereupon instructed the jury to return a verdict in favor of the plaintiff in error for the sum of $5, holding that the testimony

offered on behalf of the Government was legally insufficient to make out a prima facie case for damages. (Record, p 16.) The case was thereafter carried to the circuit court of appeals for the ninth circuit by writ of error, and that court, on the 3d day of March, 1902, affirmed the judgment of the circuit court (record, p. 65), and the case is here on writ of error for the purpose of reviewing that judgment.

SPECIFICATION OF ERRORS.

The eight assignments of error (record pp. 67, 68, and 69) raise but one question, namely, that the circuit court of appeals for the ninth circuit in its judgment and mandate made and entered on the 7th day of April, 1902, and in its opinion rendered and filed therewith, erred in holding that the certified copy from the records in the Auditor's office for the Post-office Department of the account of C. C. McCoy as failing contractor for the amount of actual damage to the United States (record p. 25); the two telegrams of May 3, and May 8, 1893, from the postmaster at San Francisco to the Department at Washington, D. C., regarding the abandonment of the service by McCoy (record pp. 48 and 49); the letter of the Second Assistant Postmaster-General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary service for the route (record p. 50); and the order of the Postmaster-General, dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor (record p. 50), were all legally insufficient to establish a *prima facie* case against McCoy

and his sureties for damages by reason of the failure of McCoy to perform his contract with the Government.

THE LAW.

The following are the various provisions of the United States Statutes which are relied upon by the Government as authorizing the introduction of the documentary evidence offered by the Government in this case, and making such documents *prima facie* evidence of the facts therein recited. (The italics are mine.)

Section 882, Revised Statutes:

> Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof.

Section 889, Revised Statutes:

> Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account books of the Post-Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States in civil suits and criminal prosecutions; *and in any civil suit, in case of "delinquency" of any postmaster or "contractor," a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.*

Section 3849, Revised Statutes:

> *Every postmaster shall promptly report to the Postmaster-General every delinquency, neglect, or malpractice of the contractors*, their agents or carriers, which comes to his knowledge.

Section 3962, Revised Statutes:

> The Postmaster-General may make deductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Act June 8, 1872, chapter 335, sections 245–247 (as amended 1874, 1876) (17 Stats., 313; 18 Stats., 235):

> SEC. 245. * * * and in case of failure of any bidder to enter into such contract to perform the service, *or, having executed a contract, in case of failure to perform the service according to his contract, he and his sureties shall be liable for the amount of said bond as "liquidated damages," to be recovered in an "action of debt" on the said bond.* * * *

Act June 8, 1872, chapter 335, section 251 (as amended 1874, 1876) (17 Stats., 314; 18 Stats., 235):

> * * * Whenever an accepted bidder shall fail to enter into contract, *or a contractor on any mail route shall fail or refuse to perform the service on said route according to his contract*, or when a new route shall be established or new service

required, or when, from any other cause, there shall not be a contractor legally bound or required to perform such service, *the Postmaster-General may make a temporary contract for carrying the mail on such route, without advertisement, for such period as may be necessary, not in any case exceeding six months, until the service shall have commenced under a contract made according to law.* * * *

Act August 3, 1882, chapter 379, section 2 (22 Stats., 216):

SEC. 2. Whenever a contractor for postal service fails to commence proper service under the contract, or, *having commenced service, fails to continue in the proper performance thereof, the Postmaster-General may employ temporary service on the route,* at a rate of pay per annum not to exceed the amount of the bond required to accompany proposals for service on such route, as specified in the advertisement of the route, or at not exceeding pro rata of such bond, in cases where service shall have been ordered to be increased, reduced, curtailed, or changed, subsequent to the execution of the contract; *the cost of such temporary service to be charged to the contractor, and to continue until the contractor commences or resumes the proper performance of service,* or until the route can be relet, as now provided by law, and service commenced under the new award of contract. All acts or parts of acts inconsistent with the provisions of this act being hereby repealed.

QUESTIONS OF LAW.

There are two questions of law presented by the record in this case, which are as follows:

First. Was the certified copy from the record in the Auditor's Office of the Post-Office Department of the account of C. C. McCoy, as failing contractor for amount of actual damage to the United States, together with the certified copies of certain other records of the Post-Office Department, upon which said account was based, and the orders of the Postmaster-General declaring McCoy a failing contractor, and recognizing contracts for temporary services and for services for the balance of the term, legally sufficient to establish the fact alleged in the sixth paragraph of the Government's complaint, that McCoy failed and refused to comply with the terms of his contract? (Pages 25 to 58 of the record.)

Second. Whether, under the peculiar provisions contained in the contract between McCoy and the Government, which permitted the Postmaster-General to annul the contract for repeated failures, and stipulated that such annulment should not impair the right of the United States to claim damages from said contractor and his sureties under the contract, and further that such damages may for the purpose of *set-off* or *counterclaim* in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor for the Treasury for the Post-Office Department, did not have the legal

effect of dispensing with positive proof of the *breach* of the contract and entitle the United States to maintain this action as an action of debt upon the showing made that the contract was, in effect, annulled by the Postmaster-General for repeated failures. (Rec., p. 45.)

ARGUMENT, AND POINTS AND AUTHORITIES.

I.

The documentary evidence introduced by the Government was legally sufficient to make out a prima facie case.

The circuit court of appeals for the ninth circuit, in affirming the judgment of the trial court, held that the evidence submitted on behalf of the Government was legally insufficient to make out a *prima facie* case. Judge Morrow, in delivering the opinion of that court on the first appeal (Record, p. 15, 114 Fed., 669), said:

> A material allegation of the complaint was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." * * * The statement of McCoy's account by the Auditor of the Post-Office Department; the telegram of the postmaster at San Francisco to the Second Assistant Postmaster-General, dated May 8, 1893, stating that the contract had been abandoned; the letter of the Second Assistant Postmaster-General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary

service for the route; the certificate of the Postmaster-General, dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the performance of his contract. * * * The court was, therefore, right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract.

The contention of the Government is that the two telegrams sent by the postmaster at San Francisco to the Postmaster-General, announcing the fact that McCoy had failed and refused to perform his contract with the Government, were admissible in evidence for the purpose of proving such fact upon the theory that they were reports from a public officer which were expressly required by statute.

In order to establish a *prima facie* case against the defendants for a breach of this contract with the Government by reason of their failure to perform, it was only necessary for the Government to introduce some evidence, however slight, legally competent to prove the fact at issue. We maintain that the evidence offered by the Government, in the absence of any evidence to the contrary, was sufficient to overcome the general denial contained in the answer.

Section 3849, Revised Statutes, provides that: "Every postmaster shall promptly report to the Postmaster-General every delinquency, neglect, or mal-

practice of the contractors, their agents or carriers, which comes to his knowledge."

Under this express requirement of the law the postmaster at San Francisco reported to the Postmaster-General, in two telegrams, that McCoy had neglected, failed, and absolutely abandoned the performance of his contract with the Government. These telegrams contained official information, and were sent in pursuance of an express duty imposed upon the postmaster by the statute above mentioned. Certified copies of these telegrams were introduced in evidence upon the trial (record, pp. 48–49). These telegrams were as follows:

[Telegram.]

SAN FRANCISCO, CAL., *May 3, 1893.*

Hon. J. LOWRIE BELL,

Second Assistant Postmaster General,

Washington, D. C.

H. Floyd, of this city, has secured judgment against C. C. McCoy, contractor, route seventy-six four seventy-five, San Francisco regulation-wagon service, for $4,300. Outfit will be sold by sheriff to satisfy judgment on May 5. No other regulation wagons are available, and contractor will probably be unable to perform service in present wagons. Is this a mail-messenger service or a star route? Instruct me what arrangements to make for temporary service, if necessary.

SAMUEL M. BACKUS,

Postmaster.

[Telegram.]

SAN FRANCISCO, CAL., *May 8, 1893.*

SECOND ASSISTANT P. M. GENERAL,

Washington, D. C.

Service absolutely abandoned this date. Have arranged with Gorman for temporary service in regulation wagons at rate of seventeen thousand five hundred per annum, dating from May 5. Department has privilege to terminate at any day. Particulars mailed.

BACKUS, *Postmaster.*

The contractor and his sureties were thereupon immediately notified by letter or telegram (record, pp. 49 and 50), that unless service under the contract was immediately resumed the Postmaster-General would declare McCoy a failing contractor and re-let the service at his expense and hold him and his sureties to the penalties prescribed by law.

One of the sureties subsequently replied to the Postmaster-General that it would be impossible for the sureties to perform McCoy's wagon service at San Francisco (record, p. 50).

On the 18th day of May, 1893, the Postmaster-General, having before him this official information with reference to the failure of McCoy to perform his contract, officially recorded the fact of the neglect and failure of McCoy to perform his contract, as reported to him by the postmaster at San Francisco, in the following order or declaration (record, p. 50):

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.

Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service, he is hereby declared a failing contractor.

W. S. BISSELL,
Postmaster-General.

Date, May 18, 1893.

Greenleaf on Evidence, section 483:

Official registers. The next class of public writings to be considered consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity

of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the State, and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would always be difficult, and often impossible, to prove facts of a public nature by means of actual witnesses upon oath.

Greenleaf on Evidence, section 493:

Official registers.—In regard to *official registers*, we have already stated the principles on which these books are entitled to credit; to which it is only necessary to add, that where the books possess all the requisites there mentioned, they are admissible as competent evidence of the *facts they contain.* But it is to be remembered that they are not, in general, evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of the marriage, and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry.

See, also, Taylor on Evidence, vol. 3, section 1591.

Wharton on Evidence, vol. 1, section 639:

Nonjudicial registries and records. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit, but to official prosecution for errors therein, such record, so far as concerns entries made in it in the course of business, is admissible in evidence as *prima facie* proof of the facts it contains. Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side. To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depositary. Thus, under this rule, the English courts have admitted custom-house registries and official papers; the public registries of municipal and similar corporations; the registries of parliamentary voters which are in the proper public custody; the registries of the coast guard noting changes of wind and weather, and light-house journals for the same purpose. So also land-tax assessments have been held admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and in Ireland poor-law valuations have been received as evidence of value. So the courts have ad-

> mitted the books of the Sick and Hurt Office to prove the death of a seaman and the time of such death; and the registries of public prisons, or penitentiaries, to prove the stay of a prisoner, though not to prove the cause of the commitment.

Wharton on Evidence, vol. 1, section 640:

> In this country we have numerous cases tending to show that official records, duly kept by public administrative officers, are, as to third parties, *prima facie* evidence of the facts entered duly by such officers in the course of their duties, as well as of documents recorded. Even a public officer's entry, when in the regular discharge of his duties, in a book he is by law required to keep, is *prima facie* evidence in his own favor when the performance of the acts registered is at issue.

It will be observed that section 3849, of the Revised Statutes, expressly made it the duty of the postmaster at San Francisco to promptly report to the Postmaster-General the failure on the part of McCoy to perform his contract with the Government; that McCoy was engaged in carrying the mails to and from the post-office in the city of San Francisco, of which office such postmaster had direct and immediate charge. If any official connected with the Government had actual knowledge of such failure on the part of McCoy to perform his contract, it was certainly the postmaster at San Francisco. His report to the Postmaster General was made under and pursuant to this express statute, which required the postmaster to write down and re-

port this particular fact which not only occurred in the course of his public duty but came under his personal observation.

The Government's contention is, that inasmuch as the law directly and specifically imposed the duty upon the postmaster at San Francisco to promptly report to the Postmaster-General the delinquency, neglect, and failure of McCoy to perform his contract with the Government, that such official report should be considered *prima facie* evidence, at least, of the fact that McCoy had failed and neglected to perform his contract. It is upon such official information that the Postmaster-General is required to act under the law and relet the contract, and hold the failing contractor and his sureties to respond in damages for whatever amount the Government might sustain by reason of such failure. Upon the receipt of this official information from the postmaster at San Francisco the Postmaster-General had official and legal knowledge of the failure of the contractor to perform his contract, and the Postmaster-General's order and official declaration regarding such fact in the office of the Post-Office Department is additional *prima facie* evidence that the contractor had failed. (See *United States* v. *Carr*, 132 U. S., 644, 653.)

Evanston v. Gunn (99 U. S., 660).

This was an action of trespass on the case brought by Jessie Gunn against the village of Evanston, Ill., to recover damages which she had sustained April 22, 1873, by reason of the alleged neglect of duty on the part of the defendant.

The plaintiff, for the purpose of showing the direction and velocity of the wind and the falling of snow on the morning in question and the previous evening, offered in evidence the record made by a person employed at Chicago by the United States Signal Service. The defendant objected because there was no law authorizing the record to be used in evidence, and because the same was not competent testimony. The court overruled the objection, and the defendant excepted.

Mr. Justice Strong, in delivering the opinion of the court, said (p. 665):

> The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the trial, not because it had not been properly made, identified, and proved, but for the alleged reason that "there was no law authorizing such records to be used in evidence, and because it was not competent testimony." The defendants thus having specified their objection, it must be considered that all others were waived, or that there was no ground upon which others could stand. (*Berks & Dauphin Turnpike Co.* v. *Myers*, 6 Serg. & R. (Pa.) 12; *Chicago & Alton Railroad Co.* v. *Morgan*, 69 Ill., 492.) We have then only to consider the objections that were made—the only ones that appear in the bill of exceptions—and they present the question whether the record conceding it to be properly proved was competent evidence. It may be admitted there is no statute expressly authorizing the admission of

such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the States and Territories for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the Chief Signal Officer of the Army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence "official registers or records kept by persons in public

office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." (Taylor, Evid., sec. 1429; 1 Greenl. Evid., sec. 483.) To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. (1 Greenl. Evid., sec. 496.) Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. (*Galt* v. *Galloway*, 4 Pet., 332.) It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned: *De Armond* v. *Nesmith*, 32 Mich., 231; *Gurney* v. *House*, 9 Gray (Mass.), 404; *The Catharine Maria*, Law. Rep., 1 Ad. and Ec., 53; *Clicquot's Champagne*, 3 Wall., 114. We think, therefore, that there was no error in admitting the record kept by the person employed for the purpose by the United States Signal Service.

In the case at bar we have, however, an express statute requiring the postmaster at San Francisco to report to the Postmaster-General every delinquency, neglect, or malpractice of a contractor which comes to his knowledge. The mere fact that under the peculiar circumstances of this case such report recorded one isolated fact, while the report or record of a Signal Service officer recorded many facts as they occurred from day to day, can not be regarded as affecting the principle involved. These two telegrams from the

postmaster at San Francisco to the Postmaster-General, which were received in evidence, were not mere private entries or memoranda. They had been made by a person whose public duty it was to record truly the facts therein stated; they were of a public character, made and reported for public purposes; and while these telegrams were nothing more than *official reports*, the fact that an express statute of the United States required such *reports* to be made to the Postmaster-General would seem upon principle, at least, to bring such *reports* within the rule which admits in evidence "official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, or under their personal observation."

In the case of *Evanston* v. *Gunn* (*supra*) the ultimate fact to be established was the condition of the weather upon a certain day, and the report of the officer whose duty it was to record such fact was held to be competent evidence to establish such fact. In the case at bar the ultimate fact to be proven is that McCoy failed and neglected to carry the mails to and from the post-office at San Francisco as required by his contract. The law required the postmaster at San Francisco to report that fact to the Postmaster-General. Such report was made in the form of two telegrams, which were filed in the office of the Postmaster-General. Our contention is that these reports were competent to establish *prima facie* such failure.

Bingham v. Cabot (3 Dallas, 19).

In this case it was held that certified copies, under the hand and seal of the Secretary of State, of letters of a public agent resident abroad, and of the official order of a foreign colonial governor, concerning the sale and disposal of a cargo of merchandise, were admissible in evidence for the purpose of proving the transactions therein recorded.

Mr. Justice Paterson said (p. 38):

> I am clearly of opinion that the certificate of the Marquis de Bouille, registered in the Admiralty of Martinique, ought to have been admitted as evidence, upon the trial of this cause. He was governor of the island, possessing a high executive and superintending control, and we must presume that he acted, on this occasion, with legitimate authority.
>
> Those letters which were written to Congress by Mr. Bingham at the time of the transaction should likewise, in my opinion, have been submitted to the jury. On the arrival of the captured vessel the governor might have awarded absolute restitution; but choosing to adopt a middle course, he directed the cargo to be sold and the proceeds to remain in the hands of Mr. Bingham, as the agent of Congress, until Congress should instruct him how to act. In the character of a public agent, therefore, Mr. Bingham received the property; and his contemporaneous correspondence on the subject in that character with the American Government was certainly proper evidence to show the original nature and complexion of the facts in

controversy. I have more doubts on the admissibility of the other letters referred to in the bill of exceptions; but in relation to them it is unnecessary to give a decided opinion.

II.

The certified copy of the records in the Auditor's office of the Post-Office Department of the account of C. C. McCoy, as failing contractor, for the amount of actual damages sustained by the United States, taken in connection with the other testimony offered, is prima facie evidence not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose.

The following provisions of law are specifically relied upon by the Government in support of this proposition:

Section 882, Revised Statutes:

> Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with originals thereof.

Section 889, Revised Statutes:

> * * * and in any civil suit, *in case of delinquency* of any postmaster or *contractor*, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

Soule v. United States (100 U. S., 8).

This was an action by the United States on the bond executed by Soule as collector of internal revenue for the first collection district of the State of California, and his sureties, bearing date January 12, 1867, and conditioned according to law. There was a judgment in favor of the United States. It was claimed by the plaintiff in error that the court erred in admitting in evidence the transcript of accounts as audited by the Fifth Auditor.

Mr. Justice Clifford, in delivering the opinion of the court, said (p. 11):

> When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the Department, * * * shall be submitted as evidence; and the court trying the cause shall be authorized to grant judgment and award execution accordingly. (Rev. Stat., sec. 886; *Bruce* v. *United States*, 17 How., 439; *Smith* v. *United States*, 5 Pet., 292; *Cox* v. *United States*, 6 id., 172; *Hoyt* v. *United States*, 10 How., 109.)

United States v. Stone (106 U. S., 525, 530).

This was a suit by the United States against the principal and his sureties upon an official bond as collector of internal revenue for the third district of Mississippi. The breach alleged was that he failed to account for and pay over the sum of $57,497.84 of the

public moneys which had come into his possession as such collector. The defendant filed several different pleas, among which was one traversing the alleged breach of the condition of the bond. There was a verdict in favor of the United States for $10,003.52. Both parties brought the case up on writs of error to reverse that judgment. One of the questions presented in the record was whether the transcript from the books of the Treasury Department at Washington, and of papers on file in the Department, were competent evidence of the matters therein set forth.

Mr. Justice Matthews, in delivering the opinion of the court, said (p. 530):

> And the separate adjustment of his accounts for both periods, made at the Treasury Department upon its books, is *prima facie* evidence, *not only of the fact and of the amount of the indebtedness, but also of the time when, and the manner in which, it arose.* It is, of course, always open to the defendants sought to be charged, to show by opposing proof, that the default charged occurred before the commencement of their liability.

United States v. Dumas (149 U. S., 278, 285).

This was an action brought by the United States to recover from Anna M. Dumas, and the sureties on her official bond, money alleged to have been illegally retained by her while postmaster at Covington, St. Tammany Parish, La. At the trial of the case in the court below the issue before the jury was whether Anna M. Dumas, as postmaster, did collect and receive in her

official capacity, from October 1, 1883, to August 3, 1885, in excess of the compensation fixed and allowed her in the order of the Postmaster-General, above all proper expenditures, the sum of $709.89. On this issue the plaintiffs in error requested the court to give the jury a certain instruction, which the court refused, and charged the jury in regard to the order (No. 161) of the Postmaster-General, as follows: "This order was in its nature provisional. The adjustment is only *prima facie* evidence that the account is as stated therein."

Mr. Justice Jackson, in delivering the opinion of the court in that case, said (p. 285):

> We think this contention of the Government can not be sustained, and that the ruling of the circuit court on the question was correct.
>
> As to the competency, merely, of this evidence there can be no question, for it is provided by section 889, Revised Statutes, that "in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."
>
> The force and effect of such testimony has been several times considered by this court. Thus in *United States* v. *Eckford's Executors* (1 How., 250), a statement of account by the officers of the Treasury was held not to be conclusive, but only prima facie evidence. So, in

United States v. *Hodge* (13 How., 478), a Treasury transcript offered in evidence was held to be competent, but not conclusive. In *Watkins* v. *United States* (9 Wall., 759), nothing more appeared in the shape of evidence than the certified transcript of accounts, and being held to be prima facie evidence, it warranted judgment for the Government for the amount therein shown to be due, in the absence of any testimony explaining or contradicting it. But that case does not hold that certified transcripts of accounts are conclusive upon the officer. So, in *Soule* v. *United States* (100 U. S., 8, 11), it was held that "Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account."

In the same line it has been held by this court that the adjustment of accounts made by the auditor is *prima facie* evidence, not only of the fact and the amount of the indebtedness, but also of the time when, and the manner in which, it arose; and that an objection to the statement does not lie to its competency, but to its effect. (*United States* v. *Stone*, 106 U. S., 525.)

And again, Mr. Justice Jackson, in the *Dumas case* (149 U. S., 286), said:

> The single question raised and presented by the plaintiffs in error was, whether the order of the Postmaster-General, in connection with the certified statement of account, was final and conclusive on the defendants in error. We hold that it was merely evidence which, unexplained or uncontradicted, would have warranted a judgment in favor of the plaintiffs in error for the balance shown thereby to be due. But this evidence did not conclude the defendants, and for aught that appears from the record they may have explained or contradicted the statement, or shown it to be incorrect; and as it does not appear what the evidence was on this subject, we are unable to say that the judgment was wrong, there being no error in the charge of the court. * * *
>
> Our conclusion is that the order of the Postmaster-General and the certified accounts produced by the Government in the present case were only *prima facie* evidence of the balance claimed against the defendants in error, and that there was no error in the court below in so holding; and the judgment is accordingly affirmed.

In that case it was held that the statement of the account certified by the Auditor, taken in connection with the order of the Postmaster-General, was sufficient to make out a *prima facie* case against the defendant and her sureties on her official bond. In order to maintain the suit it was necessary for the

Government to show a failure on the part of the principal to faithfully perform her duties as postmaster. It was alleged that this failure consisted in illegally retaining from the Government the sum of $709.89 in excess of her commissions for the period from October 1, 1883, to August 3, 1885. The law (act of June 17, 1878, 20 Stats., 140, 141) authorized the Postmaster-General, when satisfied that a postmaster had made false returns of the business, to withhold commissions on such returns. The Postmaster-General was therefore authorized to determine, in the first instance, the fact that false returns were made, and while such determination would not be conclusive evidence that such false returns were made as a matter of fact, it was held to be *prima facie* evidence of such fact.

CERTAIN FEDERAL CASES RELIED UPON BY DEFENDANTS IN ERROR CONSIDERED AND DISTINGUISHED.

United States v. Case et al. (49 Fed., 270).

This was an action by the United States against Riley W. Case on his bond as postmaster to recover an alleged deficit in his accounts. The plaintiff to prove this case depended solely upon statements of account made by the officials of the Post-Office Department and certified as required by law. It was contended on behalf of the plaintiff that these statements were sufficient to establish liability under sections 886 and 889, of the Revised Statutes, and the act of June 17, 1878. (20 Stats., 140, 141.) A verdict was ordered for the plaintiff, which was thereafter set aside and a new trial granted.

The court said:

> The accounts offered in evidence by the plaintiff bring the defendants into debt, because the officials of the Post-Office Department have charged the defendants in gross with "commissions illegally claimed" and "property illegally retained," without a word of proof, so far as the accounts show, to sustain the charges. These officials have tried the question at issue between the Department and the postmaster, found him guilty of malfeasance, assessed the damages against him, and certified their findings. The evidence, if there was any, on which these findings are based has not been returned. There is nothing to show what the property was that the postmaster is accused of retaining improperly, or its value, or the reasons which induced the officials of the Department to make the charges relating thereto. The account does not show why the commissions are illegal. It contains nothing but the unsupported decree of condemnation.

It is very evident that the case of the *United States* v. *Case* differs very materially from the case at bar. In this case the Post-Office Department had been advised through the proper official channels that McCoy had failed to perform his contract, and the Postmaster-General thereupon issued an order declaring him a failing contractor and let the contract to another party, as was his duty under the law. The records upon which this action of the Postmaster-General was based were offered in evidence. The certified copy from the

records of the Auditor's office of the Post-Office Department in account with McCoy as a failing contractor, show specifically the amount of McCoy's indebtedness to the United States, and the reasons which induced the officials of the Department to make the charges therein stated. The record not only shows the finding that McCoy had failed to perform his contract, but every act of the officials of the Department going to support such finding, and all the items of the account with McCoy from which the Auditor deduced the statements, show that McCoy was indebted to the United States in the sum of $5,772.99.

United States v. Forsythe (25 Fed. Cases, No. 15133). In this case the court said:

> The transcript being offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor from talking with the persons who had paid duties into the office. The Treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items of which a considerable part of it is composed, though put into the transcript, are not evidence. *They were not ascertained and established by the ordinary official action of the Department, and consequently they are not evidence.* Many of the items were put down by an estimate, and others had no better proof of their verity than hearsay, which is not admissible.

But such an objection can not be urged with reference to the facts certified to in the case at bar. All the facts here recorded were facts which were ascertained and established by the ordinary official action of the Department, and consequently are prima facie evidence, not only of the facts certified to and the amount of the indebtedness, but also of the time when, and the manner in which, it arose.

United States v. Buford (3 Pet., 10, 28).

This case was one in which the Government brought suit against the defendant on a Treasury statement made upon a receipt given to an officer named Morrison. Mr. Justice McClean, in delivering the opinion of the court, said:

> An account stated in the Treasury Department *which does not arise in the ordinary mode of doing business in that Department* can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. But where the moneys come into the hands of an individual, as in the case under consideration, the books of the Treasury do not exhibit the facts, nor can they be officially known to the officers of the Department. In this case, therefore, the claim must be established, not by the Treasury statement, but by the evidence on which that statement was made.

It will be noticed that in that case the ultimate fact to be proven was the fact that certain moneys had come into the hands of a certain individual. There was no law which made it the duty of an officer of the Treasury Department to ascertain that fact. Neither was that fact so intimately connected with a matter before the Treasury Department, officially, as to make it the official duty of an officer of that Department to ascertain such fact. In the case at bar, however, it was the official duty of the postmaster at San Francisco and of the Postmaster-General to ascertain whether the contractor, McCoy, had failed to perform his contract. They did ascertain this fact through the official channels of that Department, and thereafter the Postmaster-General duly recorded such fact in a proper order and subsequently acted upon such official information by entering into another contract with a different party for the performance of these selfsame services. These facts were consequently officially before the Auditor, and his account showing the indebtedness of McCoy to the United States was properly based upon such official information.

United States v. Smith et al. (35 Fed. Rep., 490).

This was an action on a bond given by the defendants to secure the faithful performance by A. R. Smith of his duties as special Indian agent under an appointment made in October, 1881. The breaches assigned were that Smith failed to account for $497.15 of public moneys intrusted to him for disbursement, and that he failed to account for public property that came into

his possession of the value of $1,777.03. The testimony on the part of the Government was contained in a Treasury transcript certified by the Register and Secretary of the Treasury pursuant to section 886 of the Revised Statutes of the United States. The court said:

> Among the various papers forming the transcript is a statement purporting to be a copy of Smith's consolidated account as borne on the books of the Treasury Department. On the debit side of the account he is charged with the sum of $1,777.03 for Government property received at the Western Shoshone Agency and not properly accounted for. The transcript of the consolidated account *does not show of what the property consisted, nor the manner in which the value of same was ascertained.* * * * Respecting this latter paper, it should also be said that it does not profess to be a transcript from any book kept, or a copy of any document on file, in the Treasury Department. * * * But a transcript from a book which merely shows *a charge in gross* against an officer for the value of public property, without describing the property, or the method of valuation, or the manner in which it came to his hands, or the disposition made of the same, is of no value even under section 886.

The account referred to in that case is substantially different from the account in the case at bar. It can hardly be said that the gross charge, such as the one made in that case, which neither discloses the items of

which it was composed nor the value, was in any sense an account such as is contemplated by sections 886, 889 of the Revised Statutes, and no such objection can be urged against the statement of account in this case, which is as follows:

Certificate to account for amount of actual damage.

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE
POST-OFFICE DEPARTMENT,
June, 1 1895.

I, Geo. A. Howard, Auditor of the Post-Office Department, do hereby certify the annexed to be a true and correct statement from the records of this office of the account, for amount of actual damage to the United States, of C. C. McCoy, failing contractor, on route No. 76475, in the State of California, pertaining to his accounts in the office of the Auditor for the Post-Office Department.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE A. HOWARD,
Auditor for the Post-Office Department.

STATEMENT OF ACCOUNT FOR AMOUNT OF ACTUAL DAMAGE.

DR. *C. C. McCoy (Cal.), failing contractor, in account with the U. S.* CR.

Route.			Route.		
76475	To amount paid J. M. Gorman for temporary service from May 5 to August 13, 1883	$4,827.77	76475	By transportation from April 1 to August 13, 1893 ..	$2,845.65
"	To amount of fine, 3d quarter, 1893.	5.00		By balance	5,772.99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894.	3,785.87			
		$8,618.64			$8,618.64
	To balance.....	$5,772.99			

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT,
Washington, D. C., June 1, 1895.
GEORGE A. HOWARD, *Auditor.*

United States v. Jones (8 Pet., 375).

This was an action of debt brought by the United States against Benjamin G. Orr, on a bond, joint and several, executed by said Orr, Alexander McCormick, and William O'Neale, to the United States, in the penal sum of $60,000. The bond was given for the faithful performance of a contract entered into by Orr with the Acting Secretary for the War Department to supply and issue certain rations for the use of the United States at such places as troops should be stationed within the limits of the Mississippi territory, the State of Louisiana, and their vicinity, north of the Gulf of

Mexico. The defendant, Orr, having died after the institution of the suit, it was proceeded in against Walter Jones, his administrator *de bonis non*, who made defense in the action, and after *oyer* of the bond and condition and the contract, pleaded performance. The plaintiffs replied that Orr did not perform the contract entered into by him. The case was tried and verdict and judgment rendered in favor of the defendants.

The court said:

> *The officers of the Treasury Department may well certify facts which come under their official notice*, but they can not certify that which does not come within their own knowledge. In the case of the *United States* v. *Buford* (3 Pet., 12), the court say that "An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that Department, can derive no additional validity from being certified under the act of Congress. Such statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by its books." The issuing of the warrants to Orr was an official act, in the ordinary mode of doing business in the Department, and the fact is proved by being certified as the act of the Congress requires. But the execution of bills of exchange and orders for money on the Treasury, though they may be connected with the settlement of an account, *can not be officially known to the accounting officers.* * * *

The foregoing cases would seem to sustain the following propositions:

First. That where an official record contains an assertion of some fact which it is the duty of the officer to ascertain and record, whether such duty be imposed by statute or required to be performed by the nature of his office, that such record is admissible in evidence as competent proof of the existence of such fact.

Second. That all facts which may be contained in an official record, but which are not required to be ascertained and recorded by the official making such record, will be disregarded by the courts when offered to prove such facts, although such records may be received for other purposes.

Applying these principles to the case at bar, we frankly admit that the certified copy of the record in the Auditor's Office of the Post-Office Department of the account of C. C. McCoy as failing contractor, showing the amount of actual damage to the United States, *unaided* by other testimony, was legally insufficient to make out a *prima facie* case. While this certificate contains a recital to the effect that C. C. McCoy was a failing contractor, there is nothing in the law making it the duty of the Auditor for the Post-Office Department to ascertain and determine such fact, nor is it a matter necessarily connected with the duties of his office. The Auditor in making up this account necessarily relied upon information furnished to him through the proper official channels of the Post-Office Department, and it was unnecessary that his statement should show the facts necessary to prove that McCoy was in fact a fail-

ing contractor. We therefore again assert that we rely upon the telegrams from the postmaster at San Francisco to the Postmaster-General (record, pp. 48 and 49), and the official record of the Postmaster-General (record, p. 50), reporting and recording such fact as the only evidence in the case which can properly be regarded as competent to establish the fact that McCoy was a failing contractor.

Neither the circuit court of appeals nor the trial court seems to have noticed the provisions of section 3849, Revised Statutes, making it the duty of the postmaster at San Francisco not only to ascertain but to report this failure on the part of the contractor. They evidently proceeded upon the theory that these telegrams were mere hearsay testimony and not entitled to any weight as evidence of the fact they purported to report. And while it is true that a letter or telegram from the postmaster at San Francisco to the Postmaster-General relating some fact which it was not his official duty to report would be mere hearsay, yet our position is that because the particular fact reported not only came to the postmaster's knowledge in his official capacity, but in addition thereto it was made his duty by statute to ascertain and report such fact, that by reason of that statute and the requirements of his office such report was no longer mere hearsay, but became competent evidence of the fact therein reported.

III.

The Postmaster-General having in effect nullified the contract, for repeated failures on the part of McCoy, under an express provision in the contract authorizing such action, it was unnecessary to prove in an action for damages sustained by the Government, the substantive fact that McCoy had committed a breach of the contract by reason of his failure to perform the services required.

The contract between McCoy and the Government contained certain provisions which were evidently not considered by the circuit court or the circuit court of appeals in rendering their opinions in this case. These stipulations are as follows (record, p. 45):

> And it is further stipulated and agreed that the Postmaster-General *may annul this contract for repeated failures;* for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.
>
> And it is further stipulated and agreed *that such annulment shall not impair the right of the*

United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, *be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.*

The act of Congress of June 8, 1872, chapter 335, sections 245, 247, as amended by the acts of 1874 and 1876, provide, among other things, as follows:

> And in case of the failure of any bidder to enter into such contract to perform the service, or having executed a contract, *in case of failure to perform the service according to his contract*, he and his sureties shall be liable for the amount of said bond as liquidated damages to be recovered in an action of debt on said bond.

This suit is expressly authorized by that statute, and the contract provides that the Postmaster-General *may annul it for repeated failures.* This provision necessarily authorized the Postmaster-General *to determine the fact that there had been repeated failures to perform*, in which event he was authorized to annul the contract and make a temporary contract for carrying the mail upon such route. This is just what the Postmaster-General did in this case, and the records of the Post-Office Department introduced in evidence clearly establish such facts. The contract then provides *that such annulment shall not impair the right of the United States to claim damages from the contractor and his sureties under the contract, and*

that such damages may for the purpose of set-off or counterclaim, etc., * * * *be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.* The United States in this suit claims damages against said contractor and his sureties, and such damages have been *assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.* These facts are clearly established by the records introduced by the Government upon the trial of this case, and are sufficient under the peculiar provisions of the contract to entitle the United States to a judgment in its favor.

The certified copies of the records from the Post-Office Department certainly established the fact that the Postmaster-General, in effect, *annulled this contract for repeated failures.* The official information which was conveyed to him in the telegrams from the postmaster at San Francisco was sufficient to warrant the Postmaster-General in annulling the contract and employing other persons to perform the services which McCoy had agreed to perform. And inasmuch as the contract contained the express stipulation that "such annullment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract * * * to be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department," it would seem that in order to recover in an action for damages that it would only be necessary to allege and prove; **first**, that the Postmaster-General had, in effect, annulled the contract on account of repeated failures; and **second**, that the damages

claimed by the United States were assessed and liquidated by the Auditor of the Treasury for the Post-Office Department, as provided for in the contract.

We maintain that these two facts were not only properly pleaded but that certified copies of the records of the Post-Office Department introduced upon the trial sufficiently established such facts and in the absence of any evidence to the contrary, that the United States was entitled to a judgment in its favor.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE UNITED STATES, *Plaintiff in Error*,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE, *Defendants in Error.*

No. 148.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

A material allegation of the complaint put in issue by the general denial, is as follows: "On the 8th day of May, 1893, the said C. C. McCoy and the said sub-contractors did abandon the said contract and did fail and refuse to perform the same."

Before the Government could recover in this action, it must sustain this allegation by competent and sufficient proof.

We assert that the transcripts from the Department, unsupported by other evidence, do not constitute such proof.

For the convenience of the Department in the administration of public business, the following statutes have been enacted:

Section 889, R. S.:

> "Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from money-order account books of the Post-office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, *in case of delinquency* of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence and the court shall be authorized thereupon to give judgment and award execution subject to the provisions of law as to proceedings in such civil suits"; and
>
> Section 882, R. S.: "Copies of any books, records, papers or documents in any of the Executive Departments, respectively, shall be admitted in evidence equally with the originals thereof."

It is contended on behalf of the Government that under the foregoing statutes the statements of the officers of the Department are sufficient, not only to indicate the amount of indebtedness, but to establish the delinquency itself.

Drastic as these statutes are, and contrary to the ordinary rules of evidence, they have nevertheless been recognized as valid by decisions of this Court. It has, however, never been held that a statement of the Department issued and certified under these statutes is sufficient to establish in any court a fact which in the ordinary course of business does not come within the knowledge of the officers who makes the statement.

Before there can be any recovery by the Government,

there is a naked substantive fact to be established, to-wit, that C. C. McCoy did abandon his contract.

Because the Government has, during all the years this case has dragged, insisted with apparent earnestness that this ultimate disputed fact is established *prima facie* by the transcripts, we will discuss the authorities which have construed the statutes in question. Though we are clear in our belief that a mere reading of the statutes will convince the Court that our position is correct, we shall nevertheless discuss authority, and in the event it shall please the Court to turn to the various Federal decisions construing and interpreting these statutes, we undertake to note them all.

We shall first take up the cases upon which we apprehend plaintiff in error will rely, and endeavor to ascertain if these cases furnish any warrant for the contention of Government.

Soule v. United States, 100 U. S. 8.

This was an action upon the bond of a revenue collector. The statute made it the duty of the fifth auditor to audit the accounts of the collector, and the collector was chargeable upon the debit side of his account with moneys collected by him. The auditor struck a balance showing the excess of moneys actually received over what was accounted for by the collector, and a transcript of this account was held to be *prima facie* evidence of the correctness of the balance certified. The Court in its opinion uses this language:

> "By the terms of the bond in suit the sureties are to become responsible if their principal does not justify and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. *Beyond doubt*

the amount went into his hands and possession as public money. * * *."*

It is evident, therefore, that the auditor in certifying these particular transcripts was certifying *to something* of which, from the records of his office, he had knowledge. Having from accounts rendered him by the collector, a record of amounts actually received by that officer, it was competent for him to state a balance. To ascertain the fact of the shortage he was not dependent upon hearsay or uncertain evidence.

United States v. Stone, 106 U. S., 525.

This was a suit upon the bond of a collector. Referring to an instruction asked by the Government, the Court uses the following language:

> "It is next assigned for error, that the court omitted to charge the jury, 'that facts not properly appearing on the books of the Treasury Department could not be embraced in the transcript, facts of which the department had no knowledge, and if so embraced they did not constitute proof in this case.' This alleged omission on the part of the court is stated in the bill of exceptions to have occurred in connection with the following instruction, which was given: 'That while it was true that the plaintiff could only recover in this case for money actually collected by Emory, and not accounted for to the government, yet, if they believe from the evidence that Emory had received the assessment rolls of the taxes imposed, that was *prima facie* evidence that he had received the money on them in the absence of any other or further proof on that subject.'
>
> Although the giving of this charge was excepted to, the error assigned upon it was not pressed in argument; nor could it be maintained, as the instruction was undoubtedly correct. Nor does it appear from the bill of exceptions that the court was asked

to give the instruction, the omission of which is not complained of; although it states that for that cause the defendants then and there excepted. But, waiving the form of the exception, it must be overruled, because, however correct the rule may be, which it states the court omitted to give to the jury, it is not shown, by anything in the present record, how it could apply to the case.

It was not shown that there were any facts embraced in the transcripts which could not properly appear on the books of the Treasury Department, *nor any of which the department had not knowledge;* and no attempt has been made to point them out in argument."

It can be easily seen how this case differs from the case at bar, when we note the last paragraph of what is quoted, a partion of which we have italicized.

United States v. Dumas, 149 U. S., 278.

In this case it was contended by the Government that the transcript from the department showing the order of the Postmaster General actually and finally established the falsity of the postmaster's account. This contention was not sustained. The Court, quoting from the decision of United States v. Barlow, 132 U. S., 271, approves the following language, which it will be apparent applies with force to our case:

"But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty any more than a private agent to act upon mere guesses and surmises without information or knowledge upon the subject."

If this language was advisedly used and the Court meant thereby to lay down a rule of decision to be followed in

subsequent cases, there is an end to the controversy presented by the present case; for certainly it cannot be contended that the officer from whose office the transcript in this case purports to come had any knowledge as to whether or not C. C. McCoy had failed to carry the mails in San Francisco.

At the risk of being tedious, let us state again that we are willing to accord to the Department's statement all the force and effect to which it is entitled. We are willing to admit that it is proper and competent evidence, and sufficient to establish *prima facie* the indebtedness of C. C. McCoy to the Government, after it is established that he is indebted at all. We are not, however, willing to concede that the Postmaster General can by his own *"ipse dixit"* establish a fact concerning which he has no knowledge. *"He is not at liberty any more than a private agent to act upon mere guesses and surmises without information or knowledge on the subject."*

Let us examine the cases where this Court and other Federal Courts have held the facts necessary to be proved were not established by the transcripts from the Treasury Department.

One of the earliest cases is *United States v. Buford*, 3 *Peters*, 12, decided in 1830. In this case it was claimed that the sum of $10,000 had been advanced to Buford by one Morrison, and it was claimed this advance was made for the use of the United States. The Treasury Department made up a statement charging Buford with this amount, and upon such statement sought judgment. Had this money gone to Buford through the regular channels of the Department, so that its advance to him were a matter of which the Department would in the ordinary course of business have had knowledge, no doubt the transcript

would have been held sufficient. Such, however, was not the case, and the Court uses the following language:

> "An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that Department, can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department where the transactions are shown by its books. In these cases the officers may certify, for they must have official knowledge of the facts stated.
>
> But where moneys come into the hands of an individual as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the Department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made."

Applying then to the case at bar the language quoted, we can make our position clear. The books of the Treasury Department do not exhibit the fact that C. C. McCoy had abandoned his contract, for that is a fact not officially known to the officers of that department. Therefore, the fact of abondonment must be established not by the treasury statement, but by the evidence on which that statement was made. That evidence is a copy of a copy of a telegram purporting to have been sent by one Backus, Postmaster at San Francisco. The copy of this message from which the copy included in the transcripts was made, would not have been competent evidence, and certainly the certificate cannot make it any the less incompetent. We shall take occasion to refer to this telegram later.

United States v. Jones, 8 Peters, 375.

In this case it was held that a treasury transcript was not sufficient to establish the propriety of a charge on

account of certain bills of exchange which had not been drawn to the order of the person sought to be charged. In other words, that the money had been received by the intestate of Jones was not established by the fact that he had been charged with the amounts upon the books of the Department.

Hoyt v. United States, 10 Howard, 109.

This case presents a fair example of items properly charged and properly certified against a public officer. It appears the account was founded upon quarterly accounts rendered to the Department by the collector himself in pursuance of law. They were, therefore, matters properly within the knowledge of the officers of the Department.

United States v. Forsythe, 6 McLean, 584.

It will be seen by the following language that this case supports our contention:

> "The transcript offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor, from talking with persons who had paid duties in the office.
>
> The Treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items of which a considerable part of it is composed, though put into the transcript, are not evidence. They were not ascertained and established by the ordinary official action of the Department, and consequently they are not evidence. Many of the items were put down by an estimate, and others had *no better proof of their verity than hearsay, which is not admissible.*"

The application of the concluding sentence to the case at bar is readily apparent.

United States v. Case, 49 Fed., 270.

During the preparation of this brief we have been favored with a copy of the brief on behalf of the United States, and we find the Attorney General has anticipated our comment on the above case. Notwithstanding what he says, we are still clear that the two cases cannot be distinguished. The following language is used in the case last cited:

> "The accounts offered in evidence by the plaintiff bring the defendants into debt because the officials of the postoffice department have charged the defendants in gross with commissions illegally retained without a word of proof so far a sthe accounts show, to sustain the charges. These officials have tried the question at issue between the Department and the Postmaster, found him guilty of malfeasance, assessed the damages against him and certified their findings.
>
> The evidence, if there was any, on which these findings are based, has not been returned."

The Attorney General professes to detect a difference between this case and the one at bar, because in our case the evidence upon which the finding of McCoy's abandonment was based is returned, that is, it is furnished by the copy of the purported telegram from the Postmaster at San Francisco. Now, we submit the position of the Government is as weak, or even weaker, when it relies upon a finding which does not expose the evidence upon which that finding is based, than when the fact appears that its sole reliance is on a finding based entirely upon such incompetent and improper evidence as the copy of the purported *telegram of the Postmaster.*

Further as to the contention that the abandonment is shown by the copy of Postmaster's telegram.

We respectfully ask the Court to note the bland admission contained on page 40 of the Government's brief, that

the transcript of account is insufficient *unaided* to make out a *prima facie* case, and the further contention that the copy of the purported telegram supplies the deficiency.

Have we not a right to assert that this admission should end the case? It is very evident that the Attorney General has fallen into error as to the effect he would have accorded to the copy of the telegram certified under Sec. 882, R. S. It is by a careless analysis of Sections 882 and 889, R. S. A brief consideration of these sections will demonstrate the error. These two sections provide for two different kinds of certificates, and for the giving of a different effect to matters certified under them respectively. Under Sec. 889, it is provided that a statement of account certified as therein prescribed shall be admitted in evidence and upon it judgment may be given. Under this provision of the statute an account was made up and certified by the Auditor for the Postoffice Department in these words:

> "* * * do hereby certify the annexed to be a true and correct statement from the records of this office of the account, etc."

The copies of the bond, proposals, bids, and the telegram were certified under Sec. 882 by the Postmaster General, in the following words:

> "I certify that the annexed are true copies taken from the files and records of this Department."

An entirely different effect is given to these papers so certified, from that given to the copy of the account from the books certified under Sec. 889. By Sec. 882, it is merely provided that such copies shall be admitted in evidence as if they were originals. It is not provided by this section, or any other law, that the Court may give judgment upon them.

This distinction is made to appear in the case of *United States v. Pinson*, 102 *U. S.*, 548, to which we ask the Court's attention.

The purpose of Section 882 is clearly to permit the Department, while retaining original documents and papers in its office, to send out properly certified copies which will have the same effect as evidence as the originals from which the copies are made, but it is not intended to permit the Department by its mere certificate to give to a copy of a paper a character as evidence which the original in its possession did not possess. Suppose we should admit that the fact of McCoy's abandonment, of which Mr. Backus, Postmaster at San Francisco, seems to have had knowledge, could be proved by an *ex parte* statement of Mr. Backus in the form of a telegram. Where is that statement in its original? In the office of the Telegraph Company at San Francisco, no doubt. A copy of such statement received at Washington is not such original, but is only secondary evidence, admissible nowhere until the absence of the original be accounted for; and the most solemn certificate which the Postmaster General can make cannot convert it into an original or give it competency.

The Honorable Attorney General so strenuously contends that the statements made by the Postmaster at San Francisco to the Postmaster General, in the form of telegrams, being official reports of a public officer, are admissible to prove the facts they contain that we are giving the point more attention than we should were it less earnestly asserted. We have always thought a sufficient answer lay in our demonstration that the Government did not establish by any competent proof that the Postmaster at San Francisco ever made such a statement, and this we still maintain. We will, however, go farther and invoke the Court's attention to the case of *United States v. Corwin*,

129 *U. S.*, 381. In this case one Phillips had contracted with the Government to deliver a certain quantity of hay to the military station at San Antoino, Texas. It was claimed that he had defaulted in his contract. This Court held that the written statements of the officers of the Quartermaster's Department, who were upon the ground and must have had knowledge of the facts, were insufficient to prove the failure of the contractor and the demand for performance.

In the case of *United States v. Carr*, 132 *U. S.*, 644, the same Section 3849 of the Revised Statutes which is referred to by the Attorney General was under consideration. The Court uses the following language, quoting in part from an earlier case:

> "The presumption that public officers have done their duty, like the presumtion of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his Treatise on Evid., Sec. 300, says: 'The true principle intended to be asserted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of these acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' *Nowhere is the presumption held to be a substitute for proof of an independent and material fact.*"

In conclusion we desire to say that it has always seemed clear to us that the contention of the Government must fail for two main reasons. The first is that the transcript of account certified under Sec. 889, R. S., is not sufficient to authorize entry of judgment, because that section only

authorizes the transcript to be used in evidence *"in case of delinquency* of any postmaster or contractor." Manifestly, it would be begging the question to assert that the transcript is sufficient to establish the fact of delinquency, which is the very condition upon which the right to use it in evidence at all is predicated.

In the second place, whatever presumptions may be indulged in favor of the acts of a public officer, this presumption does not supply proof of a substantive fact, and furthermore, even if it were the law that it did, there is no competent evidence of any statement of the Postmaster at San Francisco (who is the only individual who seems to have possessed knowledge) made in the line of his official duty or otherwise.

It has always seemed more than strange to us that if McCoy had been guilty of the flagrant violation of contract which is charged against him, the Government could not have found some way to prove such fact without attempting to violate the fundamental rules of evidence.

We are freely admitting the validity of the statutes upon which the United States relies. We think we can detect in their enactment the design of Congress to relieve the Government of unnecessary embarrassment and hardship in the production of original documents, and the proving of accounts stated upon its books, when contractors and others are proceeded against in the Courts. This purpose is entirely legitimate. But it is not the intention, and if it were, would not be a fair purpose, to permit the Government to proceed to judgment in a Court in the entire absence of any proof as to material and substantive facts necessary to be proved as a part of its case.

Respectfully submitted,

E. C. HUGHES.

Attorney for Defendants in Error.

Supreme Court of the United States.

No. 148.—October Term, 1903.

The United States, Plaintiff in Error, vs. Christopher C. McCoy, David W. Small, William O'Donnell and Thomas Mosgrove. } In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 4, 1904.]

This suit was commenced by the government to recover an amount alleged to be due on a bond to secure the performance of a contract to carry mail. The defendants were McCoy, the contractor and principal in the bond, and his sureties. The cause was put at issue by a general denial and was tried in November, 1899. The government prosecuted error from a judgment of non-suit which was entered against it. The Circuit Court of Appeals for the Ninth Circuit decided that the trial court was "right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a *prima facie* case for damages on account of the alleged entire failure of McCoy to perform the service provided in the contract." It was, however, held that a *prima facie* right to recover the amount of a fine of five dollars had been established. The judgment was, therefore, reversed and the case remanded for a new trial. (104 Fed. Rep. 669.) A second trial took place in May, 1901. At that trial the case made by the government was as follows: McCoy, being the lowest bidder, was awarded a contract for carrying the mails from July 1, 1890, to June 30, 1894, between the post office at San Francisco and certain railroad stations and steamboat landings, and executed the bond which was sued on. On May 3, 1893, the postmaster at San Francisco telegraphed the Post Office Department that, under a judgment rendered against McCoy, the sheriff had seized the wagons used by him in executing his contract, and would sell them on May the 5th; that the probable result of this sale would be to render it impossible for McCoy to continue to perform his contract, and that some temporary arrangement would be necessary, and asking instructions in the premises. Three days later, on May the 8th, the postmaster telegraphed the department that the service had been absolutely abandoned by McCoy, and that a temporary arrangement had been made to last until the department could act. On the day after the receipt of this telegram (May 9) the Post Office Department addressed a letter to McCoy, care of Zevely and Finley, Washington, D. C., giving the substance of the two telegrams above referred to, and asking if McCoy intended

to carry out his contract. On May 17 the department telegraphed the sureties on McCoy's bond, informing them that McCoy had failed to perform his contract, and inquiring if they would assume the service. On the same day the department by telegram informed the postmaster at San Francisco that his action in providing a temporary arrangement for the performance of the service was approved. On May 18 a telegram was received by the department from one of the sureties of McCoy, saying that he, the surety, was unable to perform the contract, and requesting to be relieved from all future liability on the bond, because his signature thereto had been "improperly obtained." On the same day (May 18) a finding was made by the Postmaster General that McCoy was a failing contractor, this finding being evidenced by the following certificate:

"State of California. No. 76,475.

"Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

"Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service, he is hereby declared a failing contractor.

W. S. BISSELL,
Date, May 18, 1893. *Postmaster General.*"

The department subsequently advertised for proposals for the remaining period of McCoy's term, and the same was let to one Popper, and a contract entered into with him on the subject. Thereupon the Auditor of the Post Office Department stated the account of McCoy as a failing contractor. That account charged on the debit side the sum paid for temporary service from May 5 to August 13, 1893, the date when the new contract was awarded, and also the difference between the amount stipulated to be paid in the McCoy contract and that which the government had contracted to pay Popper, the new contractor, from August 14, 1893, to June 30, 1894, when the McCoy contract would have terminated. The account, moreover, stated a charge against McCoy of $5, the amount of a fine which had been imposed on him by the department during the third quarter of 1893. McCoy was credited with the whole sum which he would have earned had he performed his obligations, the balance to the debit being the amount sued for, $5,772.99. After the government had shown the facts above stated, it rested its case, and the defendant offered no evidence whatever.

The government then requested an instruction in its favor on the ground that a *prima facie* case of liability had been proven. Exception was taken to the refusal of the court to give this instruction.

The court charged the jury as follows:

"It will not be necessary for you to retire to consider this case. You can render a verdict from your seats. This is an action in which the government sued to recover damages for breach of a mail contractor's bond—

breach of the contract. The action is against the contractor and the sureties upon his bond. The government claims damages for the total abandonment of the contract without having performed it, and as to that claim all the evidence that has been offered on the part of the government is insufficient to prove that there was an abandonment, there being no testimony of any witness having knowledge of the fact that the contractor did fail. The evidence includes the statement of account made up by the auditing department of the government, in which there appears to have been a fine of five dollars imposed upon the contractor for a particular failure, and in accordance with the decision of the Circuit Court of Appeals for this circuit that evidence is sufficient *prima facie* to entitle the government to recover the five dollars, and the defendants here in open court have admitted liability for that five dollars. Therefore your verdict will be in favor of the government for the sum of five dollars. I have prepared a verdict which you will select one of your number to sign as foreman, and that will be your verdict in the case."

To this instruction the government saved an exception. From a judgment in favor of the defendant for all but five dollars of the amount claimed, the government prosecuted error. The Circuit Court of Appeals affirmed the judgment upon the authority of the ruling made by it when the case was previously before it. This writ of error was thereupon prosecuted.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The assignments of errors and arguments at bar present two questions for decision. First. Were the copies of telegrams sent by the postmaster at San Francisco to the Post Office Department admissible in evidence? And, second, if they were, did the certified copy of the account of McCoy as a failing contractor from the books of the Auditor for the Post Office Department, the telegrams from the postmaster at San Francisco and the finding of the Postmaster General that McCoy was a failing contractor, make out a *prima facie* case for the government? Concerning the first question it suffices to say that, although it is urged that the telegrams were not admissible because they were merely copies of copies, the originals being on file in the telegraph office from which the messages were sent, the record does not show that any ruling on this subject was insisted on in the trial court, and hence no exception was taken to the introduction of the copies. As the objection that the telegrams were not the best evidence because they were merely copies was susceptible of being cured, if insisted on, it follows that the failure to so insist and reserve the question was a waiver of the objection. It then remains only to consider whether, taking into view the whole case as made by the government, a *prima facie* right to recover was established. Section 869 of the Revised Statutes is as follows:

"Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."

The certified account from the books of the Auditor for the Post Office Department which was offered in evidence came clearly within this statute. The items in that account were ascertained and established in the regular course of official action by the department, and represented disbursements made in the ordinary course of business for temporary service and under the new contract, all of which was occasioned by the actual or assumed default of McCoy. The payments shown by the items, therefore, properly appeared on the books of the Treasury Department. The account was clearly therefore competent, at least, for the purpose of showing the amount of the indebtedness, if any, existing. (*United States* v. *Stone*, 106 U. S. 325.) As, however, the correctness of the items in the account depended upon proof of the fact of the delinquency of McCoy, the contractor, it remains to determine whether the evidence introduced by the government at the trial *prima facie* established such delinquency; in other words, whether the evidence was sufficient, in the absence of proof to the contrary, to show that McCoy had totally abandoned his contract on May 5, 1893. The solution of this question depends upon the probative force of the official finding by the Postmaster General that McCoy was a failing contractor, based, as it was, upon the official report on the subject made to the department by the postmaster at San Francisco.

In *United States* v. *Dumas*, (149 U. S. 278,) the court considered the act of June 17, 1878, (20 Stat. 140, chapter 259, paragraph 1,) which provides: "That in any case where the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable." The facts were as follows: On August 11, 1888, the then Postmaster General made an order, reciting his "being satisfied" that Dumas had made false returns of business at the office of which he had been postmaster, and declaring that in the exercise of the discretion conferred by acts of Congress the commissions on such returns were withheld, and the compensation of the postmaster was fixed as stated in the order. As a result of this finding by the Postmaster General, an action was subsequently brought against the postmaster and his sureties, and it was decided that the order of the Postmaster

General and the certified accounts of the government, which were produced and which were founded upon such order, were held to be *prima facie* evidence of the balance due the government.

Moreover, by section 3962 of the Revised Statutes it is provided that—

"The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

And the second section of the act of August 3, 1882, c. 379, (22 Stat. 216,) provides as follows:

"SEC. 2. Whenever a contractor for postal service fails to commence proper service under the contract, or, having commenced service, fails to continue in the proper performance thereof, the Postmaster General may employ temporary service on the route, at a rate of pay per annum not to exceed the amount of the bond required to accompany proposals for service on such route, as specified in the advertisement of the route, or at not exceeding *pro rata* of such bond, in cases where service shall have been ordered to be increased, reduced, curtailed, or changed, subsequent to the execution of the contract; the cost of such temporary service to be charged to the contractor, and to continue until the contractor commences or resumes the proper performance of service, or until the route can be relet, as now provided by law, and service commenced under the new award of contract, all acts or parts of acts inconsistent with the provisions of this act being hereby repealed."

These provisions, by necessary implication, declare that whenever the Postmaster General "is satisfied," from evidence presented to him, that conditions exist which justify the imposition of fines or the deciding that a postal contractor has abandoned the performance of his contract, the Postmaster General may act as authorized in such provisions. It would seem to be an appropriate act for the Postmaster General to make distinct official evidence of the fact of such finding, to be filed among the archives of his office. The pertinency of such an official finding was, as has been shown, recognized in the Dumas case; and, when coupled, as it is in the case at bar, with the reports upon which the finding in the certificate was based, we think the certificate was legally competent to establish *prima facie* the fact that McCoy had abandoned his contract. It was made the duty of the postmaster at San Francisco, by section 3849 of the Revised Statutes, to "promptly report to the Postmaster General every delinquency, neglect or malpractice of the contractors, their agents or carriers, which comes to his knowledge." The reports embodied in the telegrams in question on their face show that they related to facts which had come to the knowledge of the postmaster, bearing upon the delinquency of McCoy, particularly the ultimate fact of total abandonment by McCoy of his contract.

The opinion in *United States* v. *Corwin*, (129 U. S. 381,) contains a clear recognition of the competency, as evidence, of official communications of this character, when made to those higher in authority, as supporting and giving evidential weight to findings based thereon. The reports contained in the telegrams in question present an application of what is stated in the opinion in the Corwin case (p. 385) to be "the well-established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts."

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.